

Section I
Initial Session Through Arraignment

2-1. PROCEDURAL GUIDE FOR ARTICLE 39(a) SESSION

MJ: This (general/ special) court-martial is called to order at _____ in the case of United States versus _____, USN(R) / USMC(R). Trial Counsel, please state the jurisdictional data for the court-martial followed by your qualifications.

TC: This court-martial is convened by (convening authority) by (special) (general) court-martial convening order (number) dated ____, 20__ (as amended by _____). There are no (further) modifications or corrections to the convening order.

NOTE: The MJ should examine the convening order(s) and any amendments for accuracy. IF A CAPITAL CASE, GO TO CHAPTER 8.

(TC: The following corrections are noted in the convening orders: _____.)

NOTE: Only minor changes may be made at trial to the convening orders. Any correction that affects the identity of the individual concerned must be made by an amending or correcting order.

TC: The general nature of the charge(s) in this case is a (are) violation(s) of the Uniform Code of Military Justice, Article(s) _____. The charge(s) (was) (were) preferred by _____, (investigated by _____). and forwarded with recommendations as to disposition by _____. (The Article 32 investigation was waived.)

NOTE: If the accused waived the Article 32 investigation, the MJ should inquire to ensure that it was a knowing and voluntary waiver. The script at paragraph 2-7-8, PRETRIAL AGREEMENT: ARTICLE 32 WAIVER, may be used, but if the waiver was not IAW a pretrial agreement, the first sentence of the first question should be omitted. If the waiver was part of a pretrial agreement, the MJ may defer this inquiry until discussion of the pretrial agreement at paragraph 2-2-6.

TC: The charge(s) has (have) been properly referred to this court-martial for trial by (convening authority), the convening authority, [subject to the following instructions _____].

NOTE: If the convening authority's power to convene the court is not apparent on the face of the Convening order or by the nature of the convening authority's identity, the military judge should inquire further into this matter.

TC: The charge(s) has / (have) not been referred to any other court.

TC: The charge(s) was (were) served on the accused on _____, 20____. The (three) (five) day waiting period has (not) expired.

NOTE: The MJ must pay attention to the date of service. In peacetime, if less than 3 days (SPCM) or 5 days (GCM) have elapsed from the date of service, the MJ must inquire. In calculating the waiting period, exclude the day of service and the day of trial; include Sundays and holidays. See R.C.M. 602. If the accused objects, the MJ must grant a continuance. (When computing the days, do not count the day of service or day of trial.) If a waiver must be obtained, a suggested guide can be found at paragraph 2-7-1, WAIVER OF STATUTORY WAITING PERIOD.

TC: The accused and the following persons detailed to this court-martial are present:

_____ as military judge

_____ as trial counsel

_____ as detailed defense counsel, and Mr. / Ms.

_____ as civilian counsel.

TC: The members (and the following person(s) detailed to this court-martial) are absent (_____).

TC: (_____) has been detailed as court reporter for this court-martial and (has previously been) (will now be) sworn.

NOTE: Oath for court reporter: Do you (swear) (affirm) that you will faithfully perform the duties of reporter to this court-martial (so help you God)?

TC: (I) (All members of the prosecution) have been detailed to this court-martial by _____. (I am) (All members of the prosecution are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the prosecution has) acted in any manner that might tend to disqualify (me) (us) in this court-martial.

NOTE: Oaths for counsel. When counsel for either side, including any associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the MJ:

“Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) (assistant defense) counsel in the case now in hearing (so help you God)?”

IDENTIFICATION OF ACCUSED

MJ: Are you (rank and name), the accused in this case?

ACC: (Responds.).

MJ: (Accused), please be seated and remain seated unless I direct otherwise.

2-1-1. RIGHTS TO COUNSEL

MJ: (Accused), you have the right to be represented in this court-martial by _____ (and _____), your detailed defense counsel. You also have the right to be represented by a military counsel of your own selection, provided that the counsel you request is reasonably available. All military counsel are provided to you free of charge. In addition to your right to military counsel, you also have the right to be represented by civilian counsel at no expense to the United States. Civilian counsel may represent you alone or along with your military counsel. Do you understand all of your rights to counsel?

ACC: (RESPONDS.)Yes/No, your honor

MJ: Do you have any questions about your rights to counsel?

ACC: (Responds.)

MJ: By whom do you wish to be represented?

ACC: (Responds.)

MJ: Do you want to be represented by any other military or civilian counsel?

ACC: (Responds.)

MJ: (If applicable) (Accused), you have elected representation by military counsel. If you decide between now and the trial date to retain civilian counsel, you need to inform that civilian attorney that this case is docketed for trial on _____. It is the court’s expectation that this trial will commence on that date (in accordance with the Trial Management Order), so it’s imperative that you inform any civilian attorney of those trial dates. Do you understand that?

NOTE: If the accused elects pro se representation, see applicable inquiry at paragraph 2- 7-2, PRO SE REPRESENTATION. The MJ

must be aware of any possible conflict of interest by counsel, and if a conflict exists, the MJ must obtain a waiver from the accused or order new counsel appointed for the accused. See applicable inquiry at paragraph 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.

MJ: Defense Counsel, please announce your detailing and qualifications.

DC: (I) (All detailed members of the defense) have been detailed to this court-martial by _____. (I am) (All detailed members of the defense are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the defense has) acted in any manner that might tend to disqualify (me) (us) in this court-martial.

NOTE: If any defense counsel needs to be sworn, the MJ will provide the following oath: “(Name of defense counsel), do you swear or affirm that you will faithfully perform all the duties of defense counsel in the case now in hearing (so help you God)?”

Civilian DC: I am an attorney and licensed to practice law in the state(s) of _____. I am a member in good standing of the (_____) bar(s). I have not acted in any manner which might tend to disqualify me in this court-martial.

(OATH FOR CIVILIAN COUNSEL:) MJ: Do you, _____, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?

NOTE: Appointment of legal designee: In the case of a victim of an offense under the UCMJ who is under 18 years of age and not a member of the armed forces, or who is incompetent, incapacitated, or deceased, the military judge must designate in writing a family member, a representative of the estate of the victim, or another suitable individual to assume the victim’s rights under the UCMJ.

See RCM 801(a)(6)(A) Discussion for factors to consider in determining an appropriate guardian and RCM 801(a)(6)(B) for the procedure to determine appointment of designee.

MJ: (If appropriate) Pursuant to RCM 801(a)(6), I have appointed _____ as the designee to assume (minor/incapacitated/deceased victim’s) rights under the UCMJ. My order appointing _____ is attached to the Record as AE_____.

NOTE: If a victim is named in any specification, verify whether that person is represented by VLC, has declined VLC, or is ineligible for representation. If represented, proceed with inquiry below.

MJ: (Victim Legal Counsel), you have indicated you are appearing as the (victim legal counsel) (civilian counsel) for (state the alleged victim's name). Please indicate by whom you were appointed, followed by your qualifications.

VLC: (States qualifications)

MJ: Have you filed written notice of appearance and read the Circuit Rules?

VLC: (Responds.)

MILITARY JUDGE DETAILING

MJ: I am detailed to this court-martial by (myself) (the Circuit Military Judge of the _____ Judicial Circuit,) (the Chief Judge of the) Navy-Marine Corps Trial Judiciary.

MJ: I am certified and sworn as a military judge in accordance with Articles 26 (b) and (c) and 42 (a) of the UCMJ. I am not aware of any matter that I believe may be a ground for challenge against me. Does either side desire to question or challenge me?

TC/DC: (Respond.)

MJ: [If appropriate] At a R.C.M. 802 conference held between trial and defense counsel and the military judge (in the presence of the accused) on (date)(earlier today), the following matters were discussed: _____. Do both parties concur with my summation or have anything to add?

TC/DC: (Respond.)

MJ: (If arraignment only) Prior to coming on the record I was provided with what has been marked AE ____, a Trial Management Order with proposed trial dates and deadlines. Do counsel for either side have any objection to the dates contained in AE ____?

TC/DC: (Respond.)

MJ: The proposed dates contained in AE ____ are accepted by the court and are hereby ordered as the Deadlines in this case. Counsel are advised that in order to deviate from these judicially ordered milestones, you must show good cause and obtain leave of court.

2-1-2. FORUM RIGHTS

MJ: (Accused), you have the right to be tried by a court-martial composed of a panel of members, (including if you request at least one-third enlisted persons on the panel). The members would determine if you are guilty or not guilty. If you are found guilty of any offense, they would then determine your sentence. You also have the right to request trial by military judge alone. If that request is approved, (I) (a military judge) will decide whether you are guilty or not guilty. If you are convicted of any offense, (I) (a military judge) would determine your sentence. Do you understand the difference between trial before members and trial by military judge alone?

ACC: (Responds.)

NOTE: IF CAPITAL CASE, use procedural guide in Chapter 8. In capital cases, there is no right to request trial by judge alone.

MJ: Have you discussed these choices with your counsel?

ACC: (Responds.)

MJ: Do you want to be tried by a court composed of members, (a court composed of members with enlisted representation,) or by military judge alone, or do you request to reserve forum selection at this time?]

ACC: Trial by (members) (enlisted members) (judge alone)/ Reserve, your honor.

NOTE: If accused elects enlisted court members and the request is written, mark it as an appellate exhibit. Proceed to paragraph 2-1-3, ARRAIGNMENT. If accused elects officer members, proceed to paragraph 2-1-3, ARRAIGNMENT. If accused elects trial by judge alone, continue below:

MJ: Are you requesting trial by Military Judge alone as part of a pretrial agreement you have with the convening authority?

ACC: (Responds.)

MJ: Did anyone force or threaten you into giving up your right to a trial by members (including trial by members with enlisted representation)?

ACC: (Responds.)

NOTE: Do NOT assemble the court if forum selection has been reserved, if another judge may potentially hear the case, if trial by members is selected, or if it is a guilty plea with members for sentencing until the members are present.

MJ: [If Accused requested trial by Military Judge alone and trial will proceed immediately] **Your request for trial by military judge alone is approved and this court-martial is assembled.**

NOTE: If the MJ disapproves the request, the MJ should develop the facts surrounding the denial, require argument from counsel, and state reasons for denying the request.

MJ: [If Accused reserved forum selection] **Your request to reserve forum selection in accordance with the TMO is granted.**

2-1-3. ARRAIGNMENT

MJ: **The accused will now be arraigned. (Trial counsel), are there any corrections or additions to the charge(s) or specification(s)?**

TC: Yes/No, your honor

MJ: **Does the defense desire the charge(s) and specification(s) be read?**

DC: (No, your honor. The accused waives the reading of the charge(s) and specifications.) (Yes, your honor. The accused wants the charge(s) and specification(s) read.)

MJ: [If the reading is not waived] **Accused and counsel please rise. The trial counsel will now read the charge(s) and specification(s).**

MJ: [If the reading is waived]. **Are there any motions or does the defense request to reserve motions in accordance with Appellate Exhibit ____?**

DC: The defense (has (no) (the following) motions.) (requests to reserve motions in accordance with the trial deadlines.)

NOTE: Whenever factual issues are involved in ruling on a motion, the MJ shall state essential findings of fact. If the trial counsel gives notice that the government desires a continuance to file an appeal under Article 62 (see RCM 908), the MJ should note the time on the record so that the 72-hour period may be accurately calculated.

MJ: (The request to reserve motions in accordance with the trial deadline is granted / denied.)

MJ: Accused and Counsel, please rise. (Accused), how do you plead?

DC: The accused pleads as follows: (The defense requests to reserve pleas in accordance with the Trial Management Order).

MJ: (Accused) has your counsel correctly stated your (pleas/ request to reserve)?

ACC: Yes/No your honor.

MJ: You may be seated.

NOTE: The MJ must ensure that pleas are entered after all motions are litigated. IF GUILTY PLEA, go to paragraph 2-2-1, GUILTY PLEA INTRODUCTION.

IF NOT GUILTY (JUDGE ALONE), go to Section III.

IF NOT GUILTY (MEMBERS), go to Section V.

IF court will recess, continue below:

ADVICE ON CONSEQUENCES OF VOLUNTARY ABSENCE

MJ: (Accused), you have just been arraigned on the charges before this court. An arraignment has certain legal consequences, one of which I'd like to explain to you now. Under ordinary circumstances, you have the right to be present at every stage of your trial moving forward. However, if you are voluntarily absent on the date this trial is scheduled to proceed, you may forfeit the right to be present. The trial could go forward on the date scheduled even if you were not present, up to and including sentencing, if necessary. Do you understand this?

ACC: (Responds.)

MJ: It is important that you keep your defense counsel and your chain of command apprised of your whereabouts and that you attend all session of court. Do you have any questions about what I've told you?

ACC: (Responds.)

RECESS OF COURT

MJ: Anything further from Counsel before the court recesses?

TC/DC: (Respond.)

MJ: The court is in recess.

Section II
Guilty Plea Inquiry

2-2-1. GUILTY PLEA INTRODUCTION

MJ: (Accused), we will now discuss your plea(s) of guilty. The court can only accept your guilty plea(s) if you understand their meaning and effect. If at any time you have questions or wish to talk with your defense counsel, tell your counsel, and we will take a break.

MJ: A plea of guilty is the strongest form of proof known to the law. Based on your plea(s) of guilty alone, without receiving any evidence, this court can find you guilty of the offense(s) to which you are pleading guilty. Your plea(s) of guilty will not be accepted unless you understand that by pleading guilty you are admitting your guilt as to each and every element of the offense(s) to which you are pleading guilty. Do you understand?

ACC: (Responds.)

MJ: The court will only accept your plea(s) of guilty if you are pleading guilty because you are in fact guilty and because you believe you are guilty. If you do not believe you are guilty, then you should not plead guilty for any reason. Even if you believe you are guilty, you still have a legal and moral right to plead not guilty. If you were to plead not guilty, then you would be presumed under the law to be innocent, and only by introducing evidence and proving your guilt beyond a reasonable doubt could the government overcome this presumption of innocence. Do you understand this?

ACC: (Responds.)

MJ: By pleading guilty, you give up three important rights (but you give up these rights only with respect to the offenses to which you have pled guilty).

First, the right against self-incrimination, that is, the right to say nothing at all about the offenses to which you have pled guilty.

Second, the right to a trial of the facts by this court, that is, your right to have this court-martial decide whether or not you are guilty based upon evidence the prosecution would present and on any evidence you may introduce.

Third, the right to confront any witness called against you and to call witnesses in your own defense.

Do you have any questions about any of these rights?

ACC: (Responds.)

MJ: Do you agree to give up these three rights with regard to the offense(s) to which you have pled guilty and answer the court's questions?

ACC: (Responds.)

MJ: Do you understand that by pleading guilty, there will not be a trial of any kind as to the offense(s) to which you have pled guilty?

ACC: (Responds.)

MJ: (Accused), have you had enough time to discuss your case with your counsel?

ACC: (Responds.)

MJ: Do you believe that your counsel's advice has been in your best interest?

ACC: (Responds.)

MJ: Are you pleading guilty freely and voluntarily?

ACC: (Responds.)

MJ: Has anyone threatened or forced you to plead guilty?

ACC: (Responds.)

MJ: In a moment, you will be placed under oath, and we will discuss the facts underlying your plea(s) of guilty. If what you say is not true, your statements may be used against you in a prosecution for perjury or false statement. Do you understand that?

ACC: (Responds.)

(MJ: Your plea of guilty to a lesser included offense may also be used to establish certain elements of the charged offense, if the government decides to proceed on the charged offense. Do you understand this?

ACC: (Responds.))

MJ: In addition, the government may ask that your answers be used against you in determining your sentence. Do you understand that your answers may be used as evidence against you during the sentencing portion of trial?

ACC: (Responds.)

MJ: (Accused), please stand, face the trial counsel, and raise your right hand. (Trial counsel), please administer the oath to the accused.

TC: _____, please stand and face me. Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

ACC: (Responds.)

MJ: Is there a stipulation of fact?

TC: (Yes) (No), Your Honor.

NOTE: If no stipulation exists, go to paragraph 2-2-3, GUILTY PLEA FACTUAL BASIS. If a stipulation exists, continue below.

2-2-2. STIPULATION OF FACT INQUIRY

MJ: Please have the stipulation marked as a Prosecution Exhibit, present it to me, and make sure the accused has a copy.

MJ: (Accused), I have here Prosecution Exhibit ___ for Identification, a stipulation of fact. Did you sign this stipulation?

ACC: (Responds.)

MJ: Before signing the stipulation, did you read it and discuss it with your counsel?

ACC: (Responds.)

MJ: Do both counsel agree to the stipulation and that your signatures appear on the document?

TC/DC: (Responds.)

MJ: (Accused), a stipulation of fact is an agreement between you and the government that the facts in the stipulation are true. If the stipulation is entered into evidence, those facts cannot be contradicted by you or the government. You

have the absolute right not to enter into this stipulation, and the Court will not accept it without your consent. Do you understand that?

ACC: (Responds.)

MJ: Has anyone forced or threatened you to agree to this stipulation?

ACC: (Responds.)

MJ: If I admit this stipulation into evidence, it will be used in two ways. First, I will use it to determine if you are, in fact, guilty. Second, I will use it in determining your sentence. (Explain any other use if raised in the stipulation). Do you understand and agree to these uses of the stipulation?

ACC: (Responds.)

MJ: Do both counsel also agree to these uses?

TC/DC: (Responds.)

MJ: (Accused), a stipulation of fact ordinarily cannot be contradicted. If it should be contradicted after I have accepted your guilty plea, I will reopen this inquiry. You should, therefore, let me know if there is anything whatsoever you disagree with or believe to be untrue. Do you understand that?

ACC: (Responds.)

MJ: (Accused), is everything in the stipulation true and correct?

ACC: (Responds.)

NOTE: The MJ should read the stipulation and be alert to resolve inconsistencies between what is stated in the stipulation and what the accused says during the providence inquiry.

MJ: Defense Counsel, is there any objection to Prosecution Exhibit ___ for identification?

DC: (Responds.)

MJ: Prosecution Exhibit ___ for ID, the stipulation of fact, is admitted into evidence. The words "for identification" are deleted. (Give me a moment to) (I have) read PE-___ (before coming on the record).

2-2-3. GUILTY PLEA FACTUAL BASIS

MJ: (Accused), I am now going to explain the elements of the offense(s) to which you have pled guilty. By "elements," I mean those facts that the prosecution would have to prove beyond a reasonable doubt before you could be found guilty if you had pled not guilty. Listen to the elements and ask yourself if they are true and whether or not you want to admit to the court that they are true. Then be ready to talk about the facts. Please follow along on your copy of the charge sheet as the elements are listed for you. Do you have a copy of the charge sheet in front of you?

ACC: (Responds.)

NOTE: For each specification to which the accused pled guilty, proceed as follows:

MJ: Please look at (The) Specification (___) of (The) (Additional) Charge (___), in violation of Article ___ of the Uniform Code of Military Justice. The elements of that offense, _____, are:

NOTE: List elements and explain appropriate definitions using applicable language from Chapter 3.

MJ: Do you understand the elements (and definitions) as I have read them to you?

ACC: (Responds.)

MJ: Do you understand the elements of this (these) offenses?

ACC: (Responds.)

MJ: Do these elements accurately describe what you did?

ACC: (Responds.)

MJ: Are you currently on active duty in the U.S. Navy/Marine Corps?

ACC: (Responds.)

MJ: On (date of the earliest offense) were you a member of the U.S. Navy/Marine Corps on active duty?

ACC: (Responds.)

MJ: Have you been discharged or released from active duty since that date?

ACC: (Responds.)

MJ: In each specification, is your name, rank, (rate), unit, and organization correctly stated and spelled?

ACC: (Responds.)

MJ: (Accused), look at specification ___ under (the) charge ___. Please state in your own words, why you believe you are guilty of this crime.

ACC: (Responds.)

NOTE: The MJ must elicit the facts leading to the guilty plea by conducting a direct and personal examination of the accused as to the circumstances of the alleged offense(s). The MJ must do more than elicit legal conclusions. The MJ's questions should be aimed at developing the accused's version of what happened in the accused's own words and determining if the acts or omissions encompass each and every element of the offense(s) to which the guilty plea relates. The MJ must be alert to the existence of any inconsistencies or possible defenses raised by the stipulation or the accused's testimony, and if they arise, the MJ must discuss them thoroughly with the accused. The MJ must resolve them or declare the plea improvident to the applicable specification(s).

NOTE: After obtaining the factual basis from the accused, the MJ should secure the accused's specific admission as to each element of the offense: In crafting the providence inquiry for each specification, the military judge may refer to the standard providence inquiries found within the Electronic Bench Book.

NOTE: After covering all offenses to which the accused pled guilty, the MJ continues as follows:

MJ: Does either counsel believe any further inquiry is required?

TC/DC: (Respond.)

2-2-4. MAXIMUM PUNISHMENT INQUIRY

NOTE: For sex-related offenses occurring on or after 24 June 2014, include the parenthetical language in the following inquiries with the trial counsel and accused. Qualifying sex-related offenses include Article 120(a) or (b); Article 120b(a) or (b); Forcible Sodomy, Article 125; or an attempt to commit any of the foregoing offenses under Article 80, UCMJ.

MJ: Trial Counsel, what do you calculate to be the maximum punishment authorized (and the minimum punishment required) in this case based solely on the accused's guilty plea?

TC: (Responds.)

MJ: Defense Counsel, do you agree?

DC: (Responds.)

MJ: (Accused), the maximum punishment for the offenses to which you are pleading guilty is: _____. (The mandatory minimum punishment is (a dishonorable discharge) (a dismissal) (and) (confinement for life with eligibility for parole)). (A fine may also be adjudged.)

NOTE: Before total forfeitures and a fine can be approved resulting from a guilty plea at a GCM, the accused must be advised that the pecuniary loss could exceed total forfeitures. Moreover, to have any fine approved, the MJ must advise the accused of the possibility of a fine during the providence inquiry

MJ: On your plea(s) of guilty alone, this court could sentence you to the maximum punishment that I just stated. Do you understand that?

ACC: (Responds.)

MJ: Additionally, the court must sentence you to the mandatory minimum punishment of (____). Do you understand that?

ACC: (Responds.)

MJ: (Accused), do you have any questions as to the sentence that could be imposed as a result of your guilty plea(s)?

ACC: (Responds.)

[NOTE: MJ resolves any dispute as to maximum authorized sentence.]

[NOTE: If there is a question as to the maximum punishment because of multiplicity and/or unreasonable multiplication of charges at sentencing, MJ should attempt to resolve it on the record at this point. If the maximum punishment may be subject to further dispute, MJ should advise the accused of the alternative possibilities and determine whether this affects the accused's decision to plead guilty.]

IMMIGRATION STATUS INQUIRY

MJ: Are you a citizen of the United States?

ACC: (Responds.)

MJ: [If NO] Do you understand that a criminal conviction could have adverse impacts on your immigration status, could result in your deportation, removal, exclusion from admission to the U.S. and/or denial of naturalization and bar your reentry into the U.S. later on? Have you discussed this issue with your counsel? (proceed to sex offender inquiry if applicable) [If YES] Did you become a citizen of the United States through the expedited citizenship process offered to non-citizens who serve in the Armed Forces?

ACC: (Responds.)

MJ: [If YES] Do you understand that if you are separated from the military under other than honorable conditions, including a dishonorable discharge, a bad conduct discharge, or an other than honorable separation, before you have completed five years of honorable service, your citizenship may be revoked?

ACC: (Responds.)

MJ: Do you also understand that if your citizenship were to be revoked, that could result in your deportation, removal, exclusion from admission to the U.S. and/or bar your reentry into the U.S. later on?

ACC: (Responds.)

MJ: Have you discussed this issue with your counsel?

ACC: (Responds.)

MJ: Considering the effects of these immigration laws, do you still want to plead guilty?

ACC: (Responds.)

SEX OFFENDER REGISTRATION INQUIRY

[NOTE: If charges include sexual offenses, continue with the following inquiry on collateral impacts of sex offender registration laws. If not applicable, skip.]

MJ: (Accused), do you understand that, in addition to the maximum sentence, there are potential collateral effects of your pleading guilty to this/these charge(s), including the possibility that you will have to register as a sexual offender?

ACC: (Responds.)

MJ: (Defense Counsel), did you advise the accused prior to trial of the sex offender reporting and registration requirements resulting from a finding of guilty of (state Specification(s) and Charge(s)), as well as the operation of pertinent DoD and SECNAV instructions?

DC: (Responds.)

MJ: (Accused), do you understand the potential effects of existing sexual offender registration laws in your case?

ACC: (Responds.)

MJ: Considering the possible effects of these registration laws, do you still want to plead guilty?

ACC: (Responds.)

[NOTE: If case involves domestic violence, make an inquiry into the Lautenberg Amendment issue.]

IN ALL CASES

MJ: Defense Counsel, is there a pretrial agreement in this case?

DC: (Responds.)

NOTE: If no pretrial agreement exists, continue below. If a pretrial agreement exists and trial is by Judge Alone: Go to paragraph 2-2-6, PRETRIAL AGREEMENT (JUDGE ALONE). If a pretrial agreement exists and trial is with court members: Go to paragraph 2-2-7, PRETRIAL AGREEMENT (MEMBERS).

2-2-5. IF NO PRETRIAL AGREEMENT EXISTS

MJ: (Trial Counsel), do you concur that there are no agreements?

TC: (Respond.)

MJ: (Accused), are you pleading guilty because of any discussions you or your counsel may have had with the trial counsel, convening authority, or other government representative?

ACC: (Responds.)

MJ: Has anyone made any promises to you that you would receive a reduction in sentence, or some other benefit, in exchange for your pleas of guilty?

ACC: (Responds.)

MJ: Do you understand that you may request to withdraw (any of) your pleas of guilty at any time before sentence is announced, and if you have a good reason for your request, the court will allow you to withdraw your pleas of guilty?

ACC: (Responds.)

NOTE: Go to paragraph 2-2-8, ACCEPTANCE OF GUILTY PLEA.

2-2-6. PRETRIAL AGREEMENT (JUDGE ALONE)

MJ: (Defense counsel), please have the pretrial agreement and the sentence limitation portion marked as the next two appellate exhibits in order.

DC: Your honor, the pretrial agreement and the sentence limitation portion have (previously) been marked as Appellate Exhibit(s) ___ (and ___). I am handing Appellate Exhibit ___ to the military judge at this time (and I am retaining Appellate Exhibit ___, the sentence limitation portion, at counsel table).

MJ: (Accused), I have here Appellate Exhibit ___, which is the first part of your pretrial agreement. Is this your signature that appears on page ___ of this document?

ACC: (Responds.)

MJ: Before you signed this document, did you read it completely and discuss it with your counsel?

ACC: (Responds.)

MJ: Appellate Exhibit ___ contains the sentence limitation portion of your pretrial agreement. Did you also sign that document?

ACC: (Responds.)

MJ: Before you signed the sentence limitation portion did you read it completely and discuss it with your counsel?

ACC: (Responds.)

(VERIFY IF ACCUSED IS CLOSE TO EAS DATE) (MJ: If your EAS date arrives while you are serving confinement as a part of your sentence, then all of your military pay and allowances will stop on your EAS date, regardless of the terms of your pretrial agreement. Do you understand that?

ACC: (Responds))

MJ: Did you enter into this agreement freely and voluntarily?

ACC: (Responds.)

MJ: Do Parts I and II of the agreement contain all the understandings and agreements that you and the government have in this case?

ACC: (Responds.)

MJ: Has anyone made any promises to you that are not written into this agreement in an attempt to get you to plead guilty?

ACC: (Responds.)

MJ: Do counsel for both parties agree with that?

TC/DC: (Respond.)

MJ: In a pretrial agreement, you agree to plead guilty to the offense(s), as indicated in Part I of your agreement. In exchange, the convening authority agrees to approve no sentence greater than the one you agreed to in Part II of your agreement. Do you understand?

ACC: (Responds.)

MJ: If the sentence adjudged by the court is greater than the one in your agreement, the convening authority would have to reduce the sentence to one no more severe than the one in your agreement. On the other hand, if the sentence adjudged is less than the one in your agreement, the convening authority cannot increase the court's sentence. Do you understand that?

ACC: (Responds.)

MJ: Additionally, there are automatic consequences of your sentence that may affect your pay and allowances (and reduce you in rank). I want to discuss those automatic consequences briefly with you to ensure you understand them. First, if your sentence includes either a punitive discharge and confinement, or confinement in excess of six months, the law requires the automatic forfeiture of (2/3 pay per month) (all pay and allowances) during any period of confinement. That automatic forfeiture occurs whether the sentence is suspended or not, unless the Convening Authority takes action to stop or delay the forfeitures. Do you understand ?

ACC: (Responds.)

MJ: (Secondly, if the approved sentence includes a punitive discharge or confinement in excess of 90 days, the law requires you to be administratively reduced to pay grade E-1. Again, this reduction would occur automatically,

unless the Convening Authority takes action to stop it or suspend it. Do you understand that?)

ACC: (Responds.)

MJ: (Accused), have you had enough time to discuss this agreement with your defense counsel?

ACC: (Responds.)

MJ: Are you satisfied with your defense counsel in all respects and consider (him/ she/ them) qualified to represent you at this court-martial?

ACC: (Responds.)

MJ: Do you understand you may request to withdraw (any of) your pleas of guilty at any time before the sentence is announced and, if you have a good reason, the court will allow you to do so?

ACC: (Responds.)

MJ: Please look at Paragraph 6; it lists the (five/_____) ways in which your pretrial agreement could become null and void, that is, of no effect. Did you discuss these with your counsel?

ACC: (Responds.)

MJ: Do you understand that, if this agreement becomes null and void, then your offer to plead guilty and your entry into this agreement cannot be used against you in any way?

ACC: (Responds.)

MJ: Please look at Paragraph 8. It contains (____) specially negotiated provisions. Have you read each and every provision and discussed them with your counsel?

ACC: (Responds.)

NOTE: Specially Negotiated Pretrial Agreement Terms. The military judge must discuss each specially negotiated provision in a pretrial agreement with the accused and obtain the accused's understanding of the agreement. Special attention must be given to terms that purport to waive motions. RCM 705(c) prohibits any term in a pretrial agreement to which the accused did not freely and voluntarily agree or any term which deprives the accused of the right to counsel, the right to due process, the right to

challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the right to complete and effective exercise of post-trial and appellate rights. While military appellate courts have generally upheld waiver of evidentiary objections in pretrial agreements, they have voided pretrial agreement terms which require the accused to waive all motions or to waive unlawful command influence issues unless the waiver originated with the defense and concerned only unlawful command influence issues during the accusatory phase of the court-martial. The pretrial agreement cannot make a trial an empty ritual. See Section 7 for scripts for the clauses that typically appear in pretrial agreements:

MJ: Are there any specially negotiated provisions you would like me to explain or discuss with you in more depth?

ACC: (Responds.)

MJ: [If applicable] Please look at Paragraph 9. It contains (___) notification provisions indicating that your defense counsel has discussed with you potential consequences of your plea(s) of guilty and the resultant convictions. We briefly discussed (some/all of) these earlier. Do you have any questions at this time regarding any of these provisions?

ACC: (Responds.)

MJ: (Accused), do you have any questions regarding anything contained in Part I of your pre-trial agreement?

ACC: (Responds.)

MJ: Do you understand each part of your agreement?

ACC: (Responds.)

MJ: Do counsel agree with the court's interpretation of the pretrial agreement?

TC/DC: (Respond.)

MJ: Do you have any questions about your plea(s) of guilty, your pretrial agreement, or anything we have discussed?

ACC: (Responds.)

MJ: At this point, the court finds the pretrial agreement to be in accord with appellate case law, not contrary to public policy or my own notions of fairness, and the agreement is accepted.

NOTE: Go to paragraph 2-2-8, ACCEPTANCE OF GUILTY PLEA.

2-2-7. PRETRIAL AGREEMENT (MEMBERS)

MJ: (Defense counsel), have the entire pretrial agreement including the sentence limitation portion marked as the next appellate exhibit in order.

DC: Your honor, the pretrial agreement and the sentence limitation portion have (previously) been marked as Appellate Exhibit. I am handing it to the military judge at this time.

MJ: (Accused), I have Appellate Exhibit ____, which is your pretrial agreement to include the sentence limitation portion. Is this your signature that appears on pages ____ and ____ of this document?

ACC: (Responds.)

MJ: Before you signed this document, did you read it completely and discuss it with your counsel?

ACC: (Responds.)

MJ: (VERIFY IF ACCUSED IS CLOSE TO EAS DATE) If your EAS date arrives while you are serving confinement as a part of your sentence, then all of your military pay and allowances will stop on your EAS date, regardless of the terms of your pretrial agreement. Do you understand that?

ACC: (Responds))

MJ: Did you enter into this agreement freely and voluntarily?

ACC: (Responds.)

MJ: Do Parts I and II of the agreement constitute the entire agreement and all the conditions and understandings of you and the government regarding the plea in this case?

ACC: (Responds.)

MJ: Do counsel for both parties agree with that?

TC: (Responds.)

DC: (Responds.)

MJ: The maximum sentence that the convening authority can approve in your case is: [State the maximum from the sentence limitation portion of the agreement.] **Do you understand that?**

ACC: (Responds.)

MJ: In a pretrial agreement, you agree to plead guilty to the offense(s), as indicated in Part I of your agreement. In exchange, the convening authority agrees to approve no sentence greater than the one you agreed to in Part II of your agreement. Do you understand?

ACC: (Responds.)

MJ: If the sentence adjudged by the court is greater than the one in your agreement, the convening authority would have to reduce the sentence to one no more severe than the one in your agreement. On the other hand, if the sentence adjudged is less than the one in your agreement, the convening authority cannot increase the Court's sentence. Do you understand that?

ACC: (Responds.)

MJ: Additionally, there are automatic consequences of your sentence that may affect your pay and allowances (and reduce you in rank). I want to discuss those automatic consequences briefly with you to ensure you understand them. First, if your sentence includes either a punitive discharge and confinement, or confinement in excess of six months, the law requires the automatic forfeiture of (2/3 pay per month) (all pay and allowances) during any period of confinement. That automatic forfeiture occurs whether the sentence is suspended or not, unless the Convening Authority takes action to stop or delay the forfeitures. Do you understand ?

ACC: (Responds.)

MJ: Secondly, if the approved sentence includes a punitive discharge or confinement in excess of 90 days, the law requires you to be administratively reduced to pay grade E-1. Again, this reduction would occur automatically, unless the Convening Authority takes action to stop it or suspend it. Do you understand that?

ACC: (Responds.)

MJ: Are you satisfied with your defense counsel in all respects and consider (him/ she/ them) qualified to represent you at this court-martial?

ACC: (Responds.)

MJ: Do you understand you may request to withdraw (any of) your pleas of guilty at any time before the sentence is announced and, if you have a good reason, the court will allow you to do so?

ACC: (Responds.)

MJ: Please look at Paragraph 6; it lists the (five/_____) ways in which your pretrial agreement could become null and void, that is, of no effect. Did you discuss these with your counsel?

ACC: (Responds.)

MJ: Do you understand that if this agreement becomes null and void, then your offer to plead guilty and your entry into this agreement cannot be used against you in any way?

ACC: (Responds.)

MJ: Please look at Paragraph 8. It contains (____) specially negotiated provisions. Have you read each and every provision and discussed them with your counsel?

ACC: (Responds.)

NOTE: Specially Negotiated Pretrial Agreement Terms. The military judge must discuss each specially negotiated provision in a pretrial agreement with the accused and obtain the accused's understanding of the agreement. Special attention must be given to terms that purport to waive motions. RCM 705(c) prohibits any term in a pretrial agreement to which the accused did not freely and voluntarily agree or any term which deprives the accused of the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the right to complete and effective exercise of post-trial and appellate rights. While military appellate courts have generally upheld waiver of evidentiary objections in pretrial agreements, they have voided pretrial agreement terms which require the accused to waive all motions or to waive unlawful command influence issues unless the waiver originated with the defense and concerned only unlawful command influence issues during the accusatory phase of the court-martial. The pretrial agreement cannot make a trial an empty ritual.

See Section 7 for scripts for the clauses that typically appear in pretrial agreements.

MJ: Do you understand each and every specially negotiated provision?

ACC: (Responds.)

MJ: [If applicable] Please look at Paragraph 9. It contains (___) notification provisions, indicating that your defense counsel has discussed with you potential consequences of your plea(s) of guilty and the resultant convictions. We briefly discussed (some/all of) these earlier. Do you have any questions at this time regarding any of these provisions?

ACC: (Responds.)

MJ: (Accused) Do you have any questions at this time regarding anything contained in your pre-trial agreement?

ACC: (Responds.)

MJ: Do you understand each part of your agreement?

ACC: (Responds.)

MJ: Do counsel agree with the court's interpretation of the pretrial agreement?

TC/DC: (Respond.)

MJ: Do you have any questions about your plea(s) of guilty, your pretrial agreement, or anything we have discussed?

ACC: (Responds.)

MJ: At this point, the court finds the pretrial agreement to be in accord with appellate case law, not contrary to public policy or my own notions of fairness, and the agreement is accepted.

2-2-8. ACCEPTANCE OF GUILTY PLEA

MJ: (Accused), do you have any questions about the meaning and effect of your plea(s) of guilty?

ACC: (Responds.)

MJ: Do you still want to plead guilty?

ACC: (Responds.)

MJ: Are you in fact guilty of the offense(s) to which you have pled guilty?

ACC: (Responds.)

MJ: The court finds that you have knowingly, intelligently, and consciously waived your rights against self-incrimination, to a trial of the facts by this court-martial, and to confront the witnesses against you. The court further finds that your pleas are made voluntarily and with a factual basis, and your plea(s) of guilty is/are accepted.

NOTE: If the accused has pled guilty to only some of the charges and specifications or has pled guilty to lesser included offenses, ask the trial counsel if the government is going forward on the offenses to which the accused has pled not guilty. If the government is going forward on any offenses, do not enter findings except to those offenses to which the accused pled guilty as charged in a members' trial (i.e., if the plea was to a LIO or by exceptions and substitutions and the government is going forward as charged, do not enter findings).

MJ: [If other offenses remain] (Trial counsel), what is the government's position regarding the offense(s) to which the accused has pled not guilty?

TC: (We are ready to proceed) (The government moves to withdraw the (offenses) (language) to which the accused pled not guilty, without prejudice, to ripen into prejudice upon (pronouncement of sentence)(_____)).

MJ: The Government's motion is granted.

NOTE: If issues of guilt remain in a judge alone case(contested), go to Section III and in a court members (contested) go to Section V. The MJ should not inform the court members of plea and findings of guilty prior to presentation of the evidence on another specification to which the accused pled not guilty unless the accused requests it or the guilty plea was to a LIO and the prosecution intends to prove the greater offense. Unless one of these two exceptions exists, the flyer should not have any specifications/charges which reflect provident guilty pleas if other offenses are being contested.

NOTE: If no issues of guilt remain, continue below:

MJ: Accused and counsel, please rise. (Accused), this court-martial finds you of (the charges now pending before this court) and in accordance with your pleas: (_____).

NOTE: The MJ must ensure that findings are entered clearly and completely, whether announced in the aggregate or individually, with an unambiguous finding as to each charge and specification remaining before the court. If the accused pled by exceptions and substitutions, the MJ should ensure that the findings reflect the same.

MJ: You may be seated.

NOTE: For judge alone (sentencing), go to Section IV and for court members (sentencing only), after marking the cleansed charge sheet, go to Section VI.

Section III
Judge Alone (Contested Findings)

MJ: Does the government have an opening statement?

TC: (Responds.)

MJ: Does the defense have an opening statement or do you wish to reserve?

DC: (Responds.)

MJ: Trial Counsel, you may call your first witness.

2-3-1. TRIAL PROCEEDS WITH GOVERNMENT CASE

NOTE: The TC administers the oath/affirmation to all witnesses.

NOTE: After a witness testifies, the MJ should instruct the witness along the following lines:

MJ: You are excused (permanently) (temporarily). As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down (and) (return to the waiting room) (go about your duties) (return to your activities) (be available by telephone to return within __ minutes).

TC: The government rests.

NOTE: This is the time that the Defense may make motions for a finding of not guilty. The MJ's standard for ruling on the motion is at RCM 917. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.

2-3-2. TRIAL RESUMES WITH THE DEFENSE CASE, IF ANY

MJ: Defense Counsel, you may proceed.

NOTE: If the DC reserved opening statement, the MJ should ask if the DC wishes now to make an opening statement.

DC: (Responds and presents evidence, if any.)

DC: The defense rests.

2-3-3. REBUTTAL AND SURREBUTTAL, IF ANY

MJ: Trial Counsel, any rebuttal?

TC: (Responds / presents case.)

MJ: Defense Counsel, any surrebuttal?

DC: (Responds / presents case.)

NOTE: If the accused did not testify, the MJ must ask the following question:

MJ: (Accused), you did not testify. Was it your personal decision not to testify?

ACC: (Responds.)

MJ: Trial Counsel, you may present argument.

TC: (Argument.)

MJ: Defense, you may present argument.

DC: (Argument.)

MJ: Trial Counsel, rebuttal argument?

TC: (Responds.)

MJ: The court is closed.

2-3-4. ANNOUNCEMENT OF FINDINGS

MJ: Accused and counsel, please rise. (Accused), this court-martial finds you: (_____).

NOTE: The MJ must ensure that findings are entered clearly and completely, whether announced in the aggregate or individually ,with

an unambiguous finding as to each charge and specification before the court.

NOTE: If accused is found guilty of any offense, go to Section IV. If completely acquitted, adjourn the court.

Section IV
Judge Alone (Sentencing)

MJ: Are there any corrections or additions to the personal data listed on the charge sheet?

TC/DC: (Respond.)

MJ: (Defense Counsel), has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13?

DC: (Responds.)

MJ: [If pretrial confinement] (Trial Counsel) what is your calculation for pretrial confinement credit?

TC: The Government calculates ___ days.

DC: Defense concurs/does not concur.

NOTE: MJ resolves any dispute as to pretrial confinement credit.

MJ: The Court orders ___ days of credit for pretrial confinement.

NOTE: Include the first day and all subsequent days on pretrial confinement served up to, but not including, the day of sentencing. The day of sentencing is the first day of adjudged confinement.

MJ: (Trial Counsel), does the prosecution request that the matters addressed during the providence inquiry be considered in sentencing?

TC: (Responds.).

MJ: [If yes] Any objection from the defense?

DC: (Responds.)

MJ: (If any objection) Your objection is (overruled) (sustained).

NOTE: If matters involving misconduct not charged were developed during the providence inquiry, the MJ must indicate for the record

that these matters will not be considered when determining an appropriate sentence.

MJ: The Court will note the personal data on the charge sheet [and consider the matters addressed during the providence inquiry (including the stipulation of fact, Prosecution Exhibit ____) (except for _____) in determining a sentence.

GOVERNMENT CASE IN AGGRAVATION

MJ: (Trial counsel), do you have any evidence to present for sentencing?

TC: (Responds and presents case on sentencing, if any.)

TC: Your honor, the prosecution rests.

DEFENSE CASE IN EXTENUATION AND MITIGATION

MJ: (Accused), at this time, you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or about you that you want the court to consider in deciding your sentence. Included in your right to present these matters are the rights you have to testify under oath, to make an unsworn statement, or to remain silent. If you testify under oath, you may be cross-examined by the prosecutor and questioned by the court. If you decide to make an unsworn statement, you may not be cross-examined or questioned by the court. However, the prosecution does have the right to rebut any statement of fact in your unsworn statement. You may make an unsworn statement orally or in writing, personally, or through your counsel, or you may use any combination of these methods. If you decide to remain silent, that cannot be held against you in any way. Do you understand your rights?

ACC: (Responds.)

MJ: (Defense counsel), do you have evidence to present for sentencing?

DC: (Responds and presents case on sentencing, if any.)

DC: Your honor, the defense rests.

NOTE: If the accused did not testify or provide an unsworn statement, the MJ must ask the following question:

MJ: (Accused), you did not testify or provide an unsworn statement during the sentencing phase of the trial. Was it your personal decision not to testify or provide an unsworn statement?

ACC: (Responds.)

MJ: Does the prosecution have a case in rebuttal?

TC: (Responds and presents rebuttal evidence, if any.)

MJ: Does the defense have a case in surrebuttal?

DC: (Responds and presents rebuttal evidence, if any.).

NOTE: Credit for Article 15 Punishment. If evidence of an Article 15 was admitted at trial that reflects that the accused received nonjudicial punishment for the same offense for which the accused was also convicted at the court-martial, see paragraph 2-7-21, **CREDIT FOR ARTICLE 15 PUNISHMENT.**

MJ: The court will now hear argument on sentence, (Trial counsel).

TC: (Argument on sentence.)

MJ: Defense Counsel?

DC: (Argument on sentence.)

NOTE: If the DC concedes that a punitive discharge is appropriate or argues for a discharge, the MJ should conduct an inquiry with the accused to ascertain if the accused knowingly and intelligently agrees with DC's actions. If the matter is raised before argument, the MJ should caution the DC to limit the request to a bad-conduct discharge. See paragraph 2-7-27 for the procedural instructions on **ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE.**

2-4-1. POST-TRIAL AND APPELLATE RIGHTS ADVICE

MJ: Before I close to deliberate on an appropriate sentence, I would like to discuss the accused's post-trial and appellate rights. Defense Counsel, may I have the appellate rights statement please?

DC: Your honor, the appellate rights statement has been marked as Appellate Exhibit ____, and I hand it now to the military judge.

MJ: (Accused), I have here Appellate Exhibit ____, the appellate rights statement. Is this your signature at end of this document?

ACC: (Responds.).

MJ: Before you signed this document, did you read it over carefully and discuss all your appellate rights with your counsel?

ACC: Yes/No, your honor.

MJ: Do you understand all of your appellate rights?

ACC: (Responds.).

MJ: Appellate Exhibit ____ indicates your request concerning service of the record of trial (and the recommendation of the staff judge advocate/legal officer to be delivered to: _____. Appellate Exhibit __ will be attached to the record.

NOTE: If more than one DC, the MJ should determine which counsel will be responsible for post-trial actions and upon whom the staff judge advocate's post-trial recommendation is to be served.

MJ: The court is closed for deliberations.

2-4-2. ANNOUNCEMENT OF SENTENCE

MJ: The court will come to order. All parties present when the court closed for deliberations are again present. Accused and counsel, please rise.

(Accused), this court sentences you as follows:_____.

(The accused will be credited with __ days of pretrial confinement against the accused's term of confinement.)

MJ: You may be seated.

NOTE: If a pretrial agreement exists, continue below. The MJ must ensure that all parties have the same understanding concerning the operation of Part II on the sentence of the court; otherwise, the plea may be improvident. If no pretrial agreement exists, see next NOTE below.

MJ: Please hand me Appellate Exhibit ___, the sentence limitation portion of the pretrial agreement.

MJ: (After review of Part II) My understanding of the effect of the pretrial agreement on the sentence the court adjudged is as follows: (describe each element of the sentence and the impact, if any, of the pretrial agreement).

MJ: Do counsel agree with the court's interpretation?

TC/DC: (Responds.)

MJ: (Accused), is that your understanding?

ACC: (Responds.).

MJ: Do you have any questions about the effect of Part II of your pretrial agreement on the sentence adjudged by the court?

ACC: (Responds.).

MJ: I find the pretrial agreement as a whole to be in accord with appellate case law, not contrary to public policy or my own notions of fairness, and the agreement is accepted.

ADJOURNMENT

MJ: Is there anything further to take up before this court adjourns?

TC/DC: (Respond.)

MJ: This court is adjourned.

Section V
Court Members (Contested)

Before calling the members, the military judge should discuss with counsel any preliminary matters, trial procedures, and evidentiary issues that can be considered prior to assembly. Address and, when necessary, mark the following:

1. Cleansed charge sheet (verify defense review/possible objection)
2. Court-martial member questionnaires (verify defense opportunity to review)
3. Combined TC / DC witness list
4. MJ voir dire questions
5. Determine maximum punishment for voir dire purposes
6. TC / DC requested voir dire
7. TC / DC request for instructions (Findings / Sentence)
8. Identify the Accused's company-sized unit (enlisted only)
9. Pre-admission of Prosecution exhibits as appropriate
10. Pre-admission of Defense exhibits as appropriate
11. Applicable motions
12. Judicial notice
13. Stipulations
14. Members' folders (convening order and any modifications; cleansed charge sheet; question forms, note pads and pen)
15. Members' name plates, water, and cups provided
16. Findings worksheet
17. Sentencing worksheet
18. Wheeler Factors for sentencing

2-5. PRELIMINARY INSTRUCTIONS

MJ: Bailiff, call the members.

(Members enter courtroom.)

MJ: Everyone may be seated. This (general/ special) court-martial will come to order in the case of United States versus (Accused). Trial counsel please state the jurisdictional data for this court-martial.

TC: This court is convened by (convening authority) by (General)/(Special) Court-Martial Convening Order (number) dated __, 20__ (as amended by _____), copies of which have been furnished to each member.

TC: The accused, (rank/rate, name, service, unit), and the following persons detailed to this court-martial are present

(Rank, name, service), as military judge;

(Rank, name, service), as TC / assistant TC;

(Rank, name, service), as DC / IMC / CC / assistant DC; and,
(Rank/rate, name, service), as members.

MJ: Members, please review the convening order (and modification(s)) in your folder and ensure that your name appears on the convening order with the correct rank (and rate), initials, spelling of your last name, (staff corps or warfare designation, if applicable)(and your branch of service). Please look up at me when you have completed your review.

(After opportunity for review) Does a correction need to be made to any member's information? If so, please raise your hand.

MBR: (Response, if any)

MJ: (A negative response by all members.) (The trial counsel is directed to make the correction(s) to the convening order.)

MJ: The members will now be sworn. All persons in the courtroom, please rise.

TC: As I call your name, please raise your right hand. Do you, (Members named by seniority), (swear) (or affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court-martial upon the findings or sentence unless required to do so in due course of law, so help you God? If your answer is in the affirmative, please state "I do".

MBR: I do.

MJ: Please be seated. This (general / special) court-martial is assembled. Trial Counsel, is the government ready to proceed?

TC: Your honor, the prosecution is ready to proceed with trial in the case of United States versus (Rank and Name of Accused). The general nature of the charge(s) in this case is (are): _____. The charge(s) was (were) preferred by (accuser) and has (have) been properly referred to this court-martial for trial by (convening authority), the convening authority.

MJ: Members of the court, it is appropriate that I give you some preliminary instructions. It is my duty, as military judge, to ensure this trial is conducted in a fair and orderly manner. I preside over all sessions of court, rule on all objections and other legal issues and will instruct you on the law applicable to this case. You are required to follow the court's instructions on the law and may not consult any other source as to the law pertaining to this case, unless I instruct you otherwise or it is admitted into evidence. This rule applies throughout the trial, including closed session deliberations and periods of recess. Any questions you have for me must be asked in open court. In this

case, the United States is represented by the trial counsel, (name(s)), and (name of accused) is represented by the defense counsel, (name(s)). ((Name of VLC), represents (name of victim) as legal counsel).

During the course of this trial, you may see counsel in the hallway or in the proximity of the building while we are not in session. Counsel will not speak to you, except perhaps to exchange the appropriate greeting of the day. Counsel are not being rude; for professional reasons, they are prohibited from talking with you to eliminate even the appearance of impropriety.

As court members, it is your duty to hear the evidence and determine whether the accused is guilty or not guilty and, if you find him/her guilty, to determine an appropriate sentence. Under the law, the accused is presumed to be innocent. The government alone has the burden of proving the accused's guilt by proof beyond a reasonable doubt. The accused, through counsel, need not present any evidence during this trial and may rely on that constitutional presumption of innocence.

The fact that (a) charge(s) (has) (have) been preferred against this accused and referred to this court for trial does not permit or support any inference of guilt. You alone must determine whether the accused is guilty or not guilty based solely upon the evidence presented here in court, and upon the instructions that I will give you. Since you cannot properly make that determination until you have heard all of the evidence and received my instructions, it is of vital importance that you keep an open mind until all the evidence has been presented and the instructions on the law have been given to you. You must impartially hear the evidence and the instructions on the law, and only when you are in your closed session deliberations may you properly make a determination as to whether the accused is guilty or not guilty.

The final determination as to the weight of the evidence and the credibility of the witnesses in this case rests solely upon you. You have the duty to determine the believability of the witnesses. In performing this duty, you must consider each witness's intelligence and ability to observe and accurately remember, in addition to the witness's sincerity and conduct in court, friendships, prejudices, and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence, the relationship each witness may have with either side, and how each witness might be affected by the verdict. In weighing a discrepancy by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination of the witness to tell the truth. The believability of each witness's testimony should be your guide in evaluating testimony, rather than the number of witnesses called.

With regard to sentencing, should it become necessary, you may not have any preconceived idea or formula as to either the type or the amount of punishment that should be adjudged (if the accused were to be convicted of (this) (any of

these) offense(s)). You must first hear the evidence in aggravation, if any, and extenuation and mitigation, the law with regard to sentencing, and again only when you are in your closed session deliberations may you properly make a determination as to an appropriate sentence after considering all of the punishments that I will later explain.

While you are in your closed session deliberations, only the members will be present, you must remain together, and you may not allow any unauthorized intrusion into your deliberations. Each of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you. The senior member's vote counts as one, the same as the junior member's. In addition to the duties of the other members, the senior member will act as your presiding officer during your closed session deliberations and will speak for the panel in announcing the results.

I anticipate the following general order of events in this case: questioning of the members, excusals, opening statements of counsel, presentation of evidence, closing argument of counsel, instructions on the law, deliberations and announcement of the verdict. If the accused is convicted of any (the) offense, there will also be a sentencing proceeding. I anticipate this case will last _____ days. Careful attention to all that occurs during the trial is required of all parties. The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Are there any questions over these preliminary matters? If so, please raise your hand.

MBRs: (Respond.)

MJ: (If no questions) Negative response from the members.

MJ: Members, please review the charge(s) and specification(s) before you (in your folder) at this time. When you are done with your review, please look up at me so I know you are done.

MJ: Members, have each of you had an enough time to review the charge(s) and specification(s), if so, please indicate yes by raising your hand?

MBR: Response Affirmative/Negative

2-5-1. VOIR DIRE

MJ: In a moment, I will ask you some questions. Counsel (will/may) also be given an opportunity to ask you questions. If you know of any matter that you believe might affect your impartiality as a member in this case, you must disclose that matter when asked. Bear in mind that any statement you make should be made in general terms so as not to disqualify other members who hear the statement. For example, if you have read a report of investigation of (the) (any) incident alleged in the specification(s), you should so state. Do not, however, state in front of the other members either what the report said or any opinion or

conclusion you may have arrived at as a result of having read it. If you believe that what you say might disqualify the other members who hear it, you should request to make a statement outside their presence. Some of the grounds for challenge would be if you were the accuser in this case, if you had investigated any offense charged, if you had formed or expressed an opinion as to the guilt or innocence of the accused, or any other matter that might affect your impartiality. (Also, as to the enlisted member(s), if you belong to the same company-sized unit as the accused, that is, (unit), that would be a ground for disqualification.)

MJ: Questions by counsel and the court are not asked to embarrass anyone and they are not an attack on anyone's integrity; rather, they are asked in order to determine if a legal basis for challenge exists for excusing you from this case. It is no adverse reflection upon a panel member to be excused from a particular case.

MJ: You may be questioned either individually or collectively, but in either event you should indicate an individual response to the questions asked. Unless I indicate otherwise, you are required to answer all questions.

MJ: Members, the court will now put some questions to you as a panel (and then allow counsel for each party the opportunity to pose additional questions). If your response is "yes," please raise your hand.

1. Do any of you know the accused in this case, (Accused)?
2. (If applicable) Does anyone know any person named in any of the specifications?
3. Do you know me, or any of the counsel in this case?
4. Have any of you ever spoken with either counsel?
5. [If enlisted accused]. The accused is in (company sized unit). Are any of the enlisted members in the same unit?
6. Please find your notes pages and a pen/pencil. If you know any of the persons I'm about to list, please make a note, and we'll ask some follow-up questions. The following individuals may be called as witnesses in this case: (names & commands). Do any of you know any of these witnesses?
 - a. Whom do you know?
 - b. Do you know (name of witness) in a work or social context?
 - c. Without being specific, has anything occurred during this acquaintance that would cause you to be more or less inclined to believe him/her under oath than a witness you did not know?

7. Does anyone have any prior knowledge of the facts or events in this case?
8. Has anyone mentioned anything to you, or have you read anything, about the incidents alleged in the charge sheet before you?
 - a. **Note: If this case is related to another case, inquire into the knowledge of the members as to the related case. Any specific knowledge of either case should be delayed until individual voir dire.**
9. Have you, any member of your family, or anyone whom you work with or know well ever been accused of an offense similar to any of those on the charge sheet?
10. (If appropriate) Have you, any member of your family, or anyone whom you work with or know well ever been the victim of an offense similar to any of those charged in this case?
 - a. **NOTE: If Question 9 or 10 are answered in the affirmative, the military judge may want to ask any follow-up questions outside the hearing of the other members, depending on the nature of the charged offenses.**
11. If so, will that experience influence the performance of your duties as a court member in this case in any way?
12. Do any of you have immediate family members who are law enforcement officers, prosecuting or defense attorneys, or otherwise employed in law enforcement activities?
13. The accused has pled not guilty to (all charges and specifications) (_____). Prior to your deliberations on the guilt or innocence of the accused, I will advise you that he/she must be presumed to be innocent until and unless his/her guilt is established by legal and competent evidence beyond a reasonable doubt; that in this case, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in the accused's favor and he/she shall be acquitted; and that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the government. Does any member disagree with this rule of law?
14. Can each of you apply this rule of law and vote for a finding of "Not Guilty" if you are not convinced beyond a reasonable doubt that the accused is guilty?
15. Having seen the accused and having read the charge(s) and specification(s), does anyone believe that you cannot give the accused a fair trial for any reason?

- 16. Do any of you have any racial or ethnic biases or prejudices, or any religious beliefs or religious biases that would in any way prevent you from giving this accused, faced with these charges, a fair trial?**
- 17. You are all familiar with the basics of the military justice system, and you know that the accused has been charged, and that (his) (her) charges have been forwarded to the convening authority and referred to trial. None of this warrants any inference of guilt. You may not infer or assume that the accused is guilty merely because the charges have been referred to trial. Can each of you follow this instruction?**
- 18. Does each member understand that the burden of proof to establish the accused's guilty rests solely upon the prosecution and the burden never shifts to the defense to establish the accused's innocence?**
- 19. Does each member understand, therefore, that the defense has no obligation to present any evidence or to disprove the elements of the offense(s)?**
- 20. You may expect or desire the accused to testify. The accused has an absolute right not to testify. The fact that an accused may elect not to testify in his/her own behalf may not be considered adverse to the accused in any way. Is there any member who cannot follow this instruction?**
- 21. (If appropriate because of status of witnesses) I have previously advised you that it is your duty as court members to weigh the evidence and to resolve controverted questions of fact. In so doing, if the evidence is in conflict, you will necessarily be required to give more weight to some evidence than to other evidence. The weight to be given all of the evidence in this case is solely within your discretion, so it is neither required nor expected that you will give equal weight to all of the evidence. However, a person's status, such as a commissioned officer or law enforcement officer, cannot be used as the sole basis to consider that person's testimony more believable than the testimony of any other witness. You may, however, consider that status along with all other factors when weighing the credibility of the person.**
- a. [If officer witness] Would any of you give the testimony of an officer any higher credibility than the testimony of an enlisted person solely because of the status as an officer?**
 - b. [If law enforcement witness] Would any of you give the testimony of a law enforcement official, such as a Master-at-Arms or Naval Criminal Investigative Service agent, any higher credibility solely because of the individual's occupation?**

22. Do any of you sign, prepare, or provide information for the evaluation or fitness reports of any other court member?

a. **Note: If so, the military judge may want to ask questions 23 and 24 during individual voir dire.**

23. (To junior) Will you feel inhibited or restrained in any way in performing your duties as a court member, including the free expression of your views during deliberation, because another member holds a position of authority over you?

24. (To senior) Will you be restrained or embarrassed in any way in performing your duties as a court member if a member over whom you hold a position of authority should disagree with you?

25. Each court member is entitled to an equal voice and vote with all other members regardless of rate, grade, or rank. Influence through the use of grade, rank, position, or command is prohibited. Is there any member who cannot follow this instruction?

26. It appears that this case may last (number) days until (date), and court sessions may last past normal working hours. When you are assigned as a member of a court-martial, this assignment becomes your primary duty and takes precedence over all other duties you may have. Do any of you have any official duties or personal matters that you believe might affect your ability to properly discharge your duties as a member of this court?

a. **Note: If yes, conduct individual voir dire.**

27. If sentencing proceedings are required, I will instruct you on the full range of punishments, from (no punishment) (the minimum lawful punishment) to the maximum punishment of (_____). You should consider all forms of punishment within that range. "Consider" doesn't necessarily mean that you would vote for that particular punishment. "Consider" means that you think about and make a choice in your mind, one way or the other, as to whether that's an appropriate punishment. Each member must keep an open mind: you may neither make a choice nor decide against any possible sentence until you close for deliberations and discuss an appropriate sentence in the case. Can each of you follow this instruction?

28. Can each of you be fair, impartial, and open-minded in your consideration of an appropriate sentence if called upon to do so in this case?

- 29. It is a ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime or crimes for which the accused is to be sentenced if found guilty. Does any member, having read the charge(s) and specifications (s), believe that you would be compelled to vote for any particular punishment, if the accused is found guilty, solely because of the nature of the charge(s)?**
- 30. Having reviewed the charge(s) and specification(s) before you, do any of you harbor any thoughts or feelings regarding punishments that might affect your ability to adjudge a completely fair, impartial, and appropriate sentence in this case, if the accused is convicted of (any of) the charged offense(s)?**
- 31. Is there anything at all in your past education, training, or experience, or any other matter, that you feel you would not be able to set aside and conduct your deliberations in a completely fair, impartial and unbiased manner?**
- 32. Do any of you have an issue or question that you would like to address in individual voir dire?**

ADD FOR SEXUAL ASSAULT CASES

- 33. As members of the naval service, all of us have received extensive training during recent years on the issue of sexual assault within the military. During that training, we are provided definitions and policies regarding sexual assault. Any definitions, explanations, or policies provided during sexual assault training must be completely disregarded by you in this criminal trial. At the close of the evidence in this case, I will instruct you on the elements of the offenses, and provide you definitions and instructions on the law. You must base your deliberations and decisions solely upon the evidence that is admitted in this courtroom and the definitions and instructions on the law that I will provide to you. Is there any member who cannot follow this instruction?**
- 34. Do all members understand that the training you have received and the information provided has no relevance to the determination of the issues presented in this case?**
- 35. Does any member feel obligated or pressured to find someone guilty in a case involving an allegation of sexual assault?**
- 36. Has any member been trained or served as a Victim Advocate or Sexual Assault Response Coordinator?**

37. Is there any member who will feel uncomfortable listening to testimony that may include graphic descriptions of sexual activity?
38. The evidence in this case may reveal that individuals may have engaged in sexual activity or other activity that you may consider to be morally wrong, (such as engaging in sexual activity outside of marriage). Is there any member who would not be able to set your personal beliefs aside and render a verdict solely based on the evidence presented and the law that I will later explain to you?
39. Sexual assault in the military has received a great deal of attention in the local and national press, to include newspapers, magazines, television, radio, and internet news. Do all members understand that anything you may have heard or read about sexual assault in the military has no relevance to your determination of the issues in this court-martial?

ADD FOR SEXUAL HARRASSMENT or DRUG OFFENSES

40. From your training and performance of assigned military duties, you are aware that the service has established administrative procedures for dealing with military personnel who engage in actions similar to those on the charge sheet before you that involve (sexual harassment) (drug abuse). These administrative procedures are sometimes referred to as "zero tolerance." Such administrative procedures must be disregarded by you in this criminal trial, and you must base your decision of an appropriate sentence (if required) solely on the evidence presented in this courtroom and the instructions which I will give you. Is there any member who cannot follow this instruction?

IF UCI RAISED BY COUNSEL

41. Do any of you personally know the convening authority in this case, (_____)?

Note: If yes, conduct individual voir dire.

42. Has the convening authority ever discussed his/her views on military justice with you?
43. (If convening authority is reporting senior) Does the fact that (name of convening authority) is your reporting senior in any way affect your ability to render a completely fair and impartial decision according to the evidence and instructions on the law that you will receive?

IF TRIAL IN ABSENTIA

44. I will instruct you later in this court-martial that the fact the accused is not present may not be held against him/her in any way, that you may not speculate as to why he/she is not present, and that no adverse inference may be drawn from his/her absence. His/Her absence must not be considered as an admission of guilt, nor may you draw an inference of guilt from the accused's absence. Is there any member who cannot follow this instruction?
45. If you find the accused guilty of an offense, it will then be your duty to adjudge a sentence. In that event, I will instruct you that you must not consider the fact that the accused is not present as an aggravating circumstance, and you may not adjudge a more severe sentence because of the accused's absence. Is there any member who cannot follow this instruction?
46. Will any of you, in any way, hold the accused's absence from this courtroom against him/her during this court-martial?

FOR HI-VISIBILITY CASES

47. Members, this case has received a great deal of attention in the local (and national) press. By press, I mean newspapers, magazines, television, radio, and internet news. Is there any member who has not seen any mention of this case in the press?
48. Do all members agree with the proposition that press reports can be incomplete, inaccurate, or misleading?
49. Can each of you put aside all the matters that you have heard, read, or seen in the press and decide this case based solely upon the evidence you receive in this courtroom and the law as I instruct you?

MJ:: (Optional) Do counsel for either party request any group voir dire of the members?

TC/DC: (Respond.).

NOTE: Counsel conduct group voir dire within discretion of MJ.

MJ: (After counsel group voir dire and before individual voir dire) Now, taking into consideration all of the questions that have been asked, your responses and the responses of the other members, and everything else that has been brought out during these proceedings to this point, do any of you now feel that, for any reason, you would be unable to fairly and impartially determine all the issues in

this case in accordance with the evidence, my instructions, and the applicable law?

MJ: [If no response] **Negative response from the members.**

2-5-2. INDIVIDUAL VOIR DIRE

MJ: Members of the Court, there are some matters that we must now consider outside of your presence. Please return to the deliberation room. Some of you may be recalled, however, for individual questioning.

MBRS: (Comply.)

MJ: All the members are absent. All other parties are present. Trial Counsel, do you request individual voir dire? If so, state the member and your reason(s).

TC: (Responds.)

MJ: Defense Counsel, do you request individual voir dire? If so, state the member and your reason(s).

DC: (Responds.)

NOTE: If required or in the discretion of MJ, individual members will be recalled for individual voir dire. After voir dire has been completed and all members have departed the courtroom, continue.

2-5-3. CHALLENGES

NOTE: Challenges are to be made outside the presence of the court members in an Article 39(a) session. RCM 912 encompasses challenges based upon both actual bias and implied bias. United States v. Clay, 64 MJ 274, 276 (CAAF 2007). Military Judges should analyze all challenges for cause under both actual and implied bias theories, even if the counsel do not specifically use these terms. The burden of establishing the basis for a challenge is on the party making the challenge.

Actual Bias: The test for actual bias is whether the member's bias will not yield to the evidence presented and the judge's instructions. The question of whether a member is actually biased is a question of fact; accordingly, the military judge's ability to watch the challenged member's demeanor during voir dire make the military judge specially situated in making this determination. United States v. Terry, 64 MJ 295 (CAAF 2007).

Implied Bias: Implied bias exists when, despite a disclaimer, most people in the same position as the court member would be prejudiced. United States v. Napolitano, 53 MJ 162 (CAAF 2000). In determining whether implied bias is present, military judges look to the totality of the circumstances. United States v. Strand, 59 MJ 455, 459 (CAAF 2004). Implied bias is viewed objectively, through the eyes of the public. Implied bias exists if an objective observer would have substantial doubt about the fairness of the accused's court-martial panel. Because of the objective nature of the inquiry, appellate courts accord less deference to implied bias determinations of a military judge. United States v. Armstrong, 54 MJ 51, 54 (CAAF 2000).

Liberal Grant Mandate: In close cases, military judges are enjoined to liberally grant defense challenges for cause. United States v. Clay, 64 MJ 274 (CAAF 2007). Where a military judge does not indicate on the record that he/she has considered the liberal grant mandate during the evaluation for implied bias of a defense challenge for cause, the appellate courts will accord that decision less deference during review of the ruling. Therefore, when ruling on a defense challenge for cause, the military judge should (1) state that s/he has considered the challenge under both actual and implied bias theories and is aware of the duty to liberally grant defense challenges; and (2) place the reasoning on the record. United States v. Townsend, 65 MJ 460, 464 (CAAF 2008). The following is a suggested procedure for an Article 39(a) session.

MJ: All the members are absent. Trial Counsel, do you have any challenges for cause?

TC: (Responds.)

MJ: (IF A CHALLENGE IS MADE) Defense Counsel, do you object?

DC: (Responds.)

MJ: (Granted/Denied.)

MJ: Defense Counsel, do you have any challenges for cause?

DC: (Responds.)

MJ: (IF A CHALLENGE IS MADE) Trial Counsel, do you object?

TC: (Responds.)

MJ: (IF THE MJ IS GRANTING THE CHALLENGE) MJ: The challenge is granted.

MJ: (FOR EACH CHALLENGE THE MJ IS DENYING) I have considered the challenge for cause on the basis of both actual and implied bias and the mandate to liberally grant defense challenges. The challenge is denied because (_____).

NOTE: If a challenge reduces the court below quorum, see Article 41 and 2-7-26 to determine the proper course of action. The proper COA depends on several factors: 1) what type of challenge brought the panel below quorum; 2) has either side exercised a peremptory challenge; 3) is the panel below Art 16 quorum (3/5/12) or below Art 25 quorum (1/3 enlisted); and, 4) if it's an Art 25 issue, could peremptory challenges potentially "fix" the problem. See also *United States v. Dobson*, 63 M.J. 1 (C.A.A.F. 2006).

(Quorum count matrix)

Members Remaining	Enlisted Minimum	Members Remaining	Enlisted Minimum
12	4	7	3
11	4	6	2
10	4	5 (GCM Minimum)	2
9	3	4	2
8	3	3 (SPCM Minimum)	1

MJ: Trial Counsel, do you have a peremptory challenge?

TC: (Responds.)

MJ: Defense Counsel, do you have a peremptory challenge?

DC: (Responds.)

MJ: [If peremptory challenges reduce court below quorum] The court is now below the required quorum, and we cannot proceed until additional members are detailed. I am going to recess the court until that is accomplished. The members are excused until further notice. Call the members.

MJ: If any member is excused) (Name(s) of member(s)), you are excused from further participation in this case and may return to your normal duties. Thank you for your attention to your duty here today.

[NOTE: After any excused members have withdrawn, seating should be rearranged by seniority]

9	7	5	3	1	PRESIDENT	2	4	6	8	10
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2-5-4. ANNOUNCEMENT OF PLEA

MJ: All parties are present including the members (with the exception of those who have been excused).

NOTE: If the accused has pled not guilty to all charges and specifications, announce the following, then go to paragraph 2-5-5, TRIAL ON MERITS.:

MJ: Court members, at an earlier session of this court, the accused pled not guilty to all charges and specifications.

NOTE: If the accused has pled guilty to only some specifications and has specifically requested members be advised of those guilty pleas, announce the following:

MJ: (At an earlier session, the accused was arraigned and entered the following pleas: (list pleas).) I accepted the accused's pleas of guilty to (offense(s)) and found him guilty of (that/those) offense(s). You will not be required to reach findings regarding (name charge(s) and specification(s)). Findings will be required, however, as to (name charge(s) and specification(s)), to which the accused has pled not guilty. You may not consider the fact that the accused pled guilty to (one) (some of the) offense(s) in any way in deciding whether the accused is guilty of the offense(s) to which he/she has pled not guilty.

NOTE: If the accused has pled guilty to lesser included offenses and the prosecution is going forward on the greater offense, continue below; if not, go to paragraph 2-5-5, TRIAL ON MERITS.

MJ: Members, at an earlier session, the accused was arraigned and entered the following pleas: (list pleas). I have accepted the accused's plea of guilty to the lesser included offense(s) of _____. The accused's plea of guilty to the lesser-included offense of _____ admits some of the elements of the offense charged in (the) specification ___ of charge _____. These elements are therefore established by the accused's plea without need of further proof. However, the accused's plea of guilty to this lesser included offense provides no basis for a conviction of the offense alleged as there remains in issue the element(s) of: _____.

The court is instructed that no inference of guilt of such remaining element(s) arises from any admission involved in the accused's plea. To permit a conviction of the alleged offense, the prosecution must successfully meet its burden of establishing such element(s) beyond a reasonable doubt by legal and competent evidence. Consequently, when you close to deliberate, unless you are satisfied beyond a reasonable doubt that the prosecution has satisfied this burden of proof, you must find the accused not guilty of (_____), but the plea of guilty

to the lesser included offense of (_____) will require a finding of guilty of that lesser offense without further proof.

2-5-5. TRIAL ON MERITS

MJ: Members, the following procedural instructions will apply throughout the trial. When a witness is called, the counsel who calls the witness will question the witness first. Then the opposing counsel will be given a chance to ask questions. In the event counsel makes an objection to a question or item of evidence and the court sustains the objection, you must completely disregard the question or the item of evidence. The alternative is that I might overrule an objection, in which case you may consider the question or item of evidence. When counsel have finished, if you believe there are relevant questions that you would like me to ask the witness, you will be given an opportunity to do so. Write out your questions on the form provided in your folder and sign it at the bottom. This method gives us an opportunity to review the question before it is asked, since your questions, like mine and questions of counsel, are subject to objection. Please ensure your questions are relevant to the issues before this court and are not biased to aid one party or the other. Do not allow any other member to see your question. Whether or not a question is asked, it will be attached to the record as an appellate exhibit. Bear in mind that the counsel are responsible for preparing and presenting their cases. In questioning witnesses, you must not depart from your role as an impartial trier of fact and become an advocate for either side.

MJ: Throughout the trial, including periods of recess or adjournment, you must not communicate with anyone about the case, either in person or by electronic media or other similar form of communication. You must not listen to or read any accounts of the trial from any source. Do not visit the scene of any incident alleged in the specification(s) or mentioned during the trial. Do not consult any source of law or information on the internet, written, or otherwise as to matters involved in the case and do not conduct your own investigation or research online or otherwise. Until this case is over, you are prohibited from posting anything about this court-martial on any social network sites. Further, you must not discuss the case among yourselves . You must hold your discussion of the case until you are all together in closed session deliberations. You must also avoid contact with witnesses or potential witnesses in this case, counsel, and the accused. If anyone attempts to discuss the case or communicate with you during any recess, you must immediately tell him or her to stop and report the occurrence to me at the next session. I may not repeat these matters to you before every break or recess but, please keep them in mind throughout the trial.

MJ: Each of you may take notes, if you want, and use them to refresh your memory during deliberations, but they may not be read or shown to other members. At the time of any recess, to include an overnight recess, leave your notes face down or covered and the court-reporter will safeguard them for you.

MJ: Finally, we will be taking recesses throughout the trial; however, if you feel the need for a recess before I call one, please let me know, and we will take one. I do not want anything to interfere with your attention to the court proceedings. In addition to recesses, the attorneys and I may need to have additional discussions outside of your presence. These sessions are known as “Article 39(a) sessions”. These are sessions at which I will resolve legal matters that are within my authority as military judge. Frequently, these sessions are extended by the consideration of new issues which arise. Your patience and understanding regarding these sessions will contribute greatly to an atmosphere consistent with the fair administration of justice.

MJ: Are there any questions over these preliminary matters? If so, please raise your hand.

MBR: (Response, if any.)

MJ: Members of the court, you are about to hear the opening statements of counsel. Opening statements are made to assist you in understanding the evidence that will be presented by the witnesses. You are advised that the opening statements of counsel are not evidence. Trial counsel may make an opening statement.

TC: Opening statement

MJ: Does the defense have an opening statement or do you wish to reserve until the close of the prosecution’s case?

DC: (Responds.)

MJ: Trial Counsel, you may proceed.

NOTE: The TC administers the oath/affirmation to all witnesses.

NOTE: After counsel have finished their examination of the witness, the MJ should inquire into whether the members have questions of the witness. If the members have questions, the TC will collect the written questions, have them marked as appellate exhibits, examine them, show them to the DC, and present them to the MJ so that the MJ may ask the witness the questions.

COMMON WARNINGS/INSTRUCTIONS DURING TESTIMONY

WARNING TO WITNESSES

NOTE: After a witness testifies, the MJ should instruct the witness along the following lines:

MJ: _____, you are excused (temporarily) (permanently). As long as this trial continues, do not discuss your testimony or knowledge of the case with

anyone other than counsel and accused. You may step down and (return to the waiting room) (go about your duties) (return to your activities) (be available by telephone to return within __ minutes).

LIMITING INSTRUCTION ON EVIDENCE

NOTE: Provide an instruction along the following lines when evidence has been admitted for a limited purpose:

MJ: Members, (describe evidence/testimony) has been admitted into evidence for the limited purpose to show that (state reason). You are advised that you may consider this evidence solely for that purpose and for no other. Is there any member who cannot follow this instruction?

CURATIVE INSTRUCTION

NOTE: Provide an instruction along the following lines when improper matters have been revealed to the members:

MJ: Members, (describe evidence/ testimony) is an (improper/ incorrect) (questions/ testimony/ statement of the law). You are instructed that you must completely disregard that (question/ answer/ statement). You may not consider it for any purpose whatsoever. You must decide the issues in this case solely on the evidence that properly comes before you. Is there any member who cannot follow this instruction?

TC: The government rests.

NOTE: At this time, Defense may make motions for a finding of not guilty. The motions should be made outside the presence of the court members. The MJ's standard for ruling on the motion is at RCM 917. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses. (If the motion is made before the court members and is denied, give the instruction at paragraph 2-7-13, MOTION FOR FINDING OF NOT GUILTY.)

2-5-6. TRIAL RESUMES WITH DEFENSE CASE, IF ANY

MJ: Defense Counsel, you may proceed.

NOTE: If the defense reserved opening statement, the MJ shall ask if the DC wishes to make an opening statement at this time.

DC: The defense rests.

2-5-7. REBUTTAL AND SURREBUTTAL, IF ANY

MJ: Trial Counsel, any rebuttal?

TC: (Responds / presents case.)

MJ: Defense Counsel, any surrebuttal?

DC: (Responds / presents case.)

MJ: Members, you have now heard all the evidence. At this time, counsel and I must discuss instructions outside your presence. During this time, you are directed not to discuss any aspect of this trial among yourselves or with anyone else. I anticipate your presence will be required at (time). You are excused until _____, at which time you should return to the deliberation room

MBRS: (Comply.)

2-5-8. DISCUSSION OF FINDINGS INSTRUCTIONS

MJ: All parties are present with the exception of the court members.

NOTE: If the accused did not testify, the MJ must ask the following question, outside the presence of the members:

MJ: (Accused), you did not testify. Was it your personal decision not to testify?

ACC: (Responds.)

MJ: Defense, do you wish for me to instruct on the fact the accused did not testify?

DC: (Responds.)

MJ: Counsel, do you see any lesser included offenses that are in issue in this case?

TC/DC: (Respond.)

MJ: I intend to give the following instructions: _____. Does either side have any objection to those instructions or requests for additional instructions?

TC/DC: (Respond.)

MJ: Counsel, which exhibits go to the court members?

TC/DC: (Respond.)

MJ: Defense Counsel, do you have any objection to the Findings Worksheet?

DC: (Responds.)

MJ: Is there anything else that needs to be taken up before the members are called?

TC/DC: (Respond.)

MJ: Bailiff, please call the court members.

2-5-9. PREFATORY INSTRUCTIONS ON FINDINGS

MJ: The court is called to order. All parties present when the court last recessed are again present and the members are present.

NOTE: RCM 920(b) provides that instructions on findings shall be given before or after arguments by counsel or at both times. What follows is the giving of preliminary instructions prior to argument with procedural instructions given after argument.

MJ: Members of the Court, when you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions that I will give you. My duty is to instruct you on the law. Your duty is to determine the facts, apply the law to the facts, and determine the guilt or innocence of the accused. The law presumes the accused to be innocent of the charge(s) against (him) (her).

During the trial, some of you took notes. You may take your notes with you into the deliberation room. However, your notes are not a substitute for the record of trial.

I will advise you of the elements of each offense alleged.

In (The) Specification (___) of (The) (Additional) Charge (___), the accused is charged with the offense of (specify the offense). To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

NOTE: List the elements of the offense using Chapter 3 of the Benchbook.

NOTE: If lesser included offenses are in issue, continue; if no lesser included offenses are in issue, go to paragraph 2-5-11, OTHER APPROPRIATE INSTRUCTIONS.

2-5-10. LESSER INCLUDED OFFENSE(S)

NOTE: The military judge should carefully consider United States v. Jones, 68 MJ 465 (CAAF 2010) and United States v. Alston, 69 MJ 214 (CAAF 2010) when determining whether one offense is a lesser included offense of another.

NOTE: After instructions on the elements of an offense alleged, the members of the court must be advised of all lesser included offenses raised by the evidence and within the scope of the pleadings. The members should be advised in order of diminishing severity of the elements of each lesser included offense and its differences from the principal offense and other lesser offenses, if any. The members will not be instructed on lesser offenses that are barred by the statute of limitations unless the accused waives the bar. These instructions may be stated substantially as follows:

2-5-10a. LIO Introduction

MJ: The offense(s) of _____ (is) (are) (a) lesser included offense(s) of the offense set forth in (The) Specification () (of) (The) (Additional) Charge _____. When you vote, if you find the accused not guilty of the offense charged, that is, _____, then you should next consider the lesser included offense of _____, in violation of Article _____. To find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

NOTE: List the elements of the LIO using Chapter 3 of the Benchbook.

2-5-10b. LIO Differences

MJ: The offense charged, _____, and the lesser included offense of _____ differ (in that the offense charged requires as (an) element(s) that you be convinced beyond a reasonable doubt that (state the element(s) applicable only to the greater offense), whereas the lesser offense of _____ does not include such (an) element(s).

(When an LIO involves lesser specific intent) MJ: However, the lesser offense of _____ does require that you be satisfied beyond a reasonable doubt that the accused's act(s) (was) (were) done (recklessly) (negligently) (with the specific intent to _____).

(When attempt is an LIO) MJ: However, the lesser offense of attempted _____ does require that you be satisfied beyond a reasonable doubt that the accused's act(s) (was) (were) done with the specific intent to commit the offense of _____, that the act(s) amounted to more than mere preparation and that

the act(s) apparently tended to bring about the commission of the offense of _____.

2-5-10c. Other LIO's Within the Same Specification

MJ: This lesser included offense differs from the lesser included offense I just discussed with you previously in that the previous lesser included offense of _____ requires as (an) essential element(s) that you be convinced beyond a reasonable doubt that (state the element(s) applicable only to the previous lesser offense) whereas this lesser offense of _____ does not include such (an) element(s).

(When an LIO involves lesser specific intent) MJ: However, the lesser offense of _____ does require that you be satisfied beyond a reasonable doubt that the accused's act(s) (was) (were) done (recklessly) (negligently) (with the specific intent to _____).

(When attempt is a subsequent LIO) MJ: However, the lesser offense of attempted _____ does require that you be satisfied beyond a reasonable doubt that the accused's act(s) (was) (were) done with the specific intent to commit the offense of _____, that the act(s) amounted to more than mere preparation and that the act(s) apparently tended to bring about the commission of the offense of _____.

NOTE: Repeat the above as necessary to cover all LIO's and then continue.

2-5-11. OTHER APPROPRIATE INSTRUCTIONS

NOTE: For other instructions that may be appropriate in a particular case, see Chapter 4, CONFESSIONS INSTRUCTIONS; Chapter 5, SPECIAL AND OTHER DEFENSES; Chapter 6, MENTAL RESPONSIBILITY; Chapter 7, EVIDENTIARY INSTRUCTIONS. Generally, instructions on credibility of witnesses (see Instruction 7-7-1) and circumstantial evidence (see Instruction 7-3) are typical in most cases and should be given prior to proceeding to the following instructions.

2-5-12. CLOSING SUBSTANTIVE INSTRUCTIONS ON FINDINGS

MJ: You are further advised:

First, that the accused is presumed to be innocent until (his) (her) guilt is established by legal and competent evidence beyond a reasonable doubt;

Second, if there is reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and (he) (she) must be acquitted; (and)

(Third, if there is a reasonable doubt as to the degree of guilt, that doubt must be resolved in favor of the lower degree of guilt as to which there is no reasonable doubt; and)

Lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of (each) (the) offense.

Some of you may have served as jurors in civil cases, or as board members in administrative boards, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that, it must be beyond a reasonable doubt.

By reasonable doubt is intended not a fanciful, speculative, or ingenious doubt or conjecture, but an honest and actual doubt suggested by the material evidence or lack of it in the case. It is a genuine misgiving caused by insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense and arising from the state of the evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you shall give him/her the benefit of the doubt and find him/her not guilty.

The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution that does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole of the evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element of an offense, then you should find the accused guilty of that offense.

Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence, you are expected to use your own common sense and your knowledge of human nature and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence. Bear in mind you may properly believe one witness and disbelieve several other witnesses whose testimony conflicts with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

You must disregard any comment or statement or expression made by me during the course of the trial that might seem to indicate any opinion on my part as to

whether the accused is guilty or not guilty since you alone have the responsibility to make that determination. Each of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience.

2-5-13. FINDINGS ARGUMENT

MJ: At this time, you will hear argument by counsel. You are advised that arguments of counsel are not evidence in this case. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you. Because the government has the burden of proof, Trial Counsel may argue first and present a rebuttal argument.

Trial Counsel, you may proceed.

TC: (Argument.)

MJ: Defense Counsel, you may argue on findings.

DC: (Argument.)

MJ: Trial Counsel, do you desire a rebuttal argument?

TC: (Responds.)

(MJ: Counsel have referred to instructions that I gave you. If there is any inconsistency between what counsel have said about the instructions and the instructions which I gave you, you must accept my statement as being correct.)

NOTE: If there is an objection that counsel is misstating the evidence during argument, advise the panel as follows:

(MJ: Argument by counsel is not evidence. Counsel are not witnesses. If the facts as you remember them differ from the way counsel state the facts, it is your memory of the facts that controls.)

2-5-14. PROCEDURAL INSTRUCTIONS ON FINDINGS

MJ: Members, the following procedural rules will apply to your deliberation and must be observed. The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberations should properly first include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret written ballot, and all members of the court must vote. **MJ:** You vote on the specification(s) under the charge before you vote on the charge. (The order in which the several charges and specifications are to be

voted on should be determined by the president subject to objection by a majority of the members.)

If you find the accused guilty of any specification under (the) (a) charge, the finding as to (the) (that) charge is guilty.

The junior member collects and counts the votes, and the count is checked by the president, who immediately announces the result of the ballot to the members.

MJ: The concurrence of at least two thirds of the members is required for any finding of guilty. Since we have ___ members, that means that ___ members must concur in any finding of guilty. If you have ___ votes of guilty with regard to the offense, then that will result in a finding of guilty for that offense. If fewer than ___ members vote for a finding of guilty, then your ballot resulted in a finding of not guilty.

Number of Members	Two Thirds	Number of Members	Two thirds
3	2	8	6
4	3	9	6
5	4	10	7
6	4	11	8
7	5	12	8

MJ: [Contested LIO] If a finding of not guilty is made to an offense, vote next on the lesser included offense(s) (in order of decreasing severity). If a finding of guilty is made, you have convicted the accused of that lesser included offense. If you have voted on the lesser included offense(s) and a finding of not guilty is made (as to all lesser included offenses), you have acquitted the accused of this specification and its lesser included offense(s).

MJ: You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, the president of the court should write out on one of the questions forms that a "reconsideration has been proposed" and provide the form to the bailiff. Do not state (1) whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or (2) which specification (and charge) is involved. We will then re-open the court and I will then give you specific instructions on how to reconsider a finding.

NOTE: See paragraph 2-7-14, RECONSIDERATION INSTRUCTION (FINDINGS).

As soon as the court has reached its findings, and I have examined the findings worksheet, the findings will be announced by the president in open court. The format is set out for you in the findings worksheet, Appellate Exhibit ____. The bailiff will deliver Appellate Exhibit ____ to the president of the court at this time.

NOTE: The MJ may explain how the Findings Worksheet should be used. A suggested approach follows:

MJ: (President), you may use the findings worksheet as an aid in putting your findings in proper form. The first portion of the worksheet will be used if the accused is acquitted of (the) (all) charge(s) and specification(s). The second part will be used if the accused is convicted as charged of (the) (all) charge(s) and specification(s). (And the third portion will be used if the accused is convicted of some, but not all, of the offenses.)

Once you have finished filling in what is applicable, please line out or cross out everything that is not applicable so that when I check your findings I can ensure that they are in proper form.

(You will note that the findings worksheet has been modified to reflect the words that would be deleted (as well as the words that would be substituted there for) if you found the accused guilty of the lesser-included offense(s). These modifications of the worksheet in no way indicate any opinion by me or by counsel concerning any degree of guilt of this accused. They are merely included to aid you in understanding what findings might be made in this case, and for no other purpose whatsoever. The worksheet is provided only as an aid in finalizing your decision.)

MJ: If, during your deliberations, you have any questions concerning the findings worksheet or any other matter, please open the court and I will take those matters up with you. I would ask that if you do have any such question, that you write it down on one of the question forms provided so that an accurate record of your question can be maintained.

MJ: The Uniform Code of Military Justice prohibits me and everyone else from entering your closed session deliberations. As I mentioned at the beginning of trial, you must all remain together in the deliberations room during deliberations. During your deliberations, you must not communicate with or provide any information to anyone outside the deliberation room by any means. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service or any text or instant messaging service; or any internet chat room, blog or website such as Facebook, LinkedIn, YouTube or Twitter, to communicate to anyone outside the deliberation room or to conduct any research about this case. If you need a recess, if you have a question, or when you have reached your findings, you may notify the bailiff, who will then notify me that you desire to return to open court to make your desires or findings known.

MJ: Does any member have any questions concerning my instructions?

MBRs: (Respond.).

MJ: Do counsel object to the instructions given or request additional instructions?

TC/DC: (Respond.)

MJ: If it is necessary to take a recess or leave the deliberation room for any reason during your deliberations, you must notify me through the bailiff. We must return to an open session of court and recess. At the conclusion of your recess, we must reassemble in open court and again formally close to continue your deliberations. This is a vital legal requirement. With that in mind, (President), do you want to take a recess before you begin deliberations, or do you want to begin immediately?

PRES: (Responds.)

MJ: Bailiff, please hand to the president of the court Prosecution Exhibit(s) ___ and (Defense Exhibit(s) __) for use during the court's deliberations.)

TC/BAILIFF: (Complies.)

MJ: (President), please do not mark on any of the exhibits, except the Findings Worksheet.

MJ: Members of the court, you may now withdraw to the deliberation room. The court is closed for deliberations.

2-5-15. PRESENTENCING SESSION

NOTE: When the members close to deliberate, the MJ may convene an Article 39(a) session to cover presentencing matters or may wait until after findings.

MJ: This Article 39(a) session is called to order. All parties are present, except the court members.

MJ: (Accused), when the members return from their deliberations, if you are acquitted of all charges and specifications, that will terminate the trial. On the other hand, if you are convicted of any offense, then the court will determine your sentence. During that part of the trial, you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or yourself that you want the court to consider when deciding your sentence. Included in your right to present such matters are the rights you have to testify under oath, to make an unsworn statement, or to remain silent. If you testify under oath, you may be cross-examined by the trial counsel and questioned by me and the members. If you decide to make an unsworn statement, you may not be cross-examined by trial counsel or questioned by me or the members. However, the prosecution does have the right to rebut any statement of fact in your unsworn statement. You may make an unsworn statement orally or in writing, personally, or through your counsel, or you may use a combination of these ways. If you decide to exercise your right to remain silent, that cannot be held against you in any way. Do you understand your right to present matters on sentencing?

ACC: (Responds.)

MJ: Are there any corrections or additions to the personal data listed on the charge sheet?

TC/DC: (Respond.)

MJ: (Defense Counsel), has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13?

DC: (Responds.)

MJ: (Trial Counsel), what is your calculation of credit for pretrial confinement?

TC: (Responds.)

DC: Defense concurs/does not concur.

MJ: The Court orders _____ days of credit for pretrial confinement. The trial counsel will read the accused's personal data to the members at the appropriate time except for the SSN.

MJ: Counsel, do you have any documentary evidence on sentencing that could be marked and offered at this time?

TC/DC: (Respond.)

MJ: Is there anything else by either side?

TC/DC: (Respond.)

MJ: This Article 39(a) session is terminated to await the members' findings.

2-5-16. FINDINGS

MJ: The court will come to order. All parties present when the court closed are again present, with the exception of the members who are absent. Bailiff, please call the members.

(President), has the court reached findings in this case?

PRES: (Responds.)

MJ: Are the findings reflected on the Findings Worksheet?

PRES: (Responds.)

MJ: Please [(place it into the folder)/(fold it over)] and hand it to the Bailiff. Bailiff, please bring me the findings worksheet.

BAILIFF: (Complies.)

NOTE: If a possible error exists on the Findings Worksheet, the MJ must take corrective action. All advice or suggestions to the court from the MJ must occur in open session. In a complex matter, it may

be helpful to hold an Article 39(a) session to secure suggestions and agreement on the advice to be given to the court.

Occasionally, corrective action by the court involves reconsideration of a finding, and in that situation, instructions on the reconsideration procedure are required (see paragraph 2-7-14, RECONSIDERATION INSTRUCTION (FINDINGS)).

If the words “divers occasions” or another specified number of occasions have been excepted IAW United States v. Walters, 58 MJ 391 (CAAF 2003), the MJ must ensure there remains no ambiguity in the findings. Normally that is accomplished by the panel substituting (a) relevant date(s), or other facts. See paragraph 7-25 for a suggested instruction on clarifying an ambiguous verdict.

MJ: The findings worksheet appears to be in the proper form. Bailiff, please return it to (President).

BAILIFF: (Complies.)

MJ: Accused and counsel please rise. (President), please announce the findings of the court.

PRES: (Complies.)

MJ: You may be seated. Bailiff, please retrieve the findings worksheet and hand it to the court reporter.

NOTE: If there are findings of guilty, go to paragraph 2-5-17, SENTENCING PROCEEDINGS;

MJ: (If acquittal) Members of the court, you have now completed your duties. Please leave all the exhibits behind. You may take your personal notes with you or leave those behind and they will be destroyed by the court reporter.

MJ: Before I excuse you, let me advise you of one matter. To assist you in determining what you may discuss about this case now that it is over, I remind you of the oath you took as a court member. Essentially, the oath prevents you from discussing your deliberations with anyone, to include stating any member’s opinion or vote, unless ordered to do so by a court. This prohibition includes such disclosure on social networking or other internet sites. You may, of course, discuss your personal observations of the trial and the process of how a court-martial functions, but not what was discussed during your deliberations.

MJ: Your deliberations are carried on in the secrecy of the deliberation room to permit the utmost freedom of debate and so that each of you can express your views without fear of being subjected to criticism by the accused, the public, the convening authority, or anyone else. In deciding whether to answer questions

about this case, and if so, what to disclose, you should have in mind your own interests and the interests of the other members of the court. Does any member have any questions at this time?

MBRs: (Respond.)

MJ: Members of the court, again, I want to thank you for your attendance and service in this case. You may now depart the courtroom and resume your normal duties.

(Members depart the courtroom.)

MJ: This court-martial is adjourned.

2-5-17. SENTENCING PROCEEDINGS

NOTE: If the MJ has not previously advised the accused of his allocution at the beginning of Section IV, the MJ must do so at this time outside the presence of the court members. If there were findings of guilty of which the members had not previously been informed, they should be advised of those other findings now and given an amended cleansed charge sheet that includes the other offenses.

MJ: Members of the Court, at this time we will begin the sentencing phase of the trial.

MJ: Trial Counsel, you may read the personal data concerning the accused to the members.

TC: (Reads personal data)

MJ: Members of the Court, I have previously admitted into evidence (Prosecution Exhibit(s) __, which (is) (are) _____) (and) (Defense Exhibit(s) __, which (is) (are) _____). You will have (this) (these) exhibit(s) available to you during your deliberations.

Trial Counsel, do you have anything else to present at this time?

TC: (Responds and presents case on sentencing.)

TC: The government rests.

MJ: Defense Counsel, you may proceed.

NOTE: MRE 412 evidence offered in sentencing. MRE 412 applies in sentencing, as it does on findings. US v. Fox, 24 MJ 110 (CMA 1987); US v. Whitaker, 34 MJ 822 (AFCCA 1992); US v. Gaddis, 70 MJ 248 (CAAF 2011).

DC: (Responds and presents case on sentencing.)

DC: The defense rests.

2-5-18. REBUTTAL AND SURREBUTTAL, IF ANY

MJ: Trial Counsel, does the prosecution have a case in rebuttal?

TC: (Responds / presents case.)

MJ: Defense Counsel, any surrebuttal?

DC: (Responds / presents case.)

MJ: Members of the Court, you have now heard all the evidence in this case. At this time, we need to have a hearing outside of your presence to go over the instructions that I will give you. I expect that you will be required to be present again at _____.

2-5-19. DISCUSSION OF SENTENCING INSTRUCTIONS

MJ: All parties are present with the exception of the court members.

NOTE: If the accused did not testify or provide an unsworn statement, the MJ must ask the following question outside the presence of the members:

MJ: (Accused), you did not testify or provide an unsworn statement during the sentencing phase of the trial. Was it your personal decision not to testify or provide an unsworn statement?

ACC: (Responds.)

NOTE: For sex-related offenses occurring on or after 24 June 2014, include the parenthetical language in the following inquiry with the trial counsel and the defense counsel. Qualifying sex-related offenses include Article 120(a) or (b); Article 120b(a) or (b); Forcible Sodomy, Article 125; or an attempt to commit any of the foregoing offenses under Article 80, UCMJ.

MJ: Counsel, what do you calculate to be the maximum sentence authorized (and the minimum punishment required) based upon the findings of the court?

TC/DC: (Respond.)

MJ: Trial Counsel, please mark the Sentence Worksheet as Appellate Exhibit ____, show it to the Defense, and present it to me.

TC: (Complies.)

NOTE: Listing of punishments. Only those punishments on which an instruction will be given should ordinarily be listed on the Sentence Worksheet. If all have agreed that a fine is not appropriate, then it ordinarily should not be listed on the worksheet. If a dishonorable discharge or a dismissal is a mandatory minimum sentence, then this punishment should be listed on the worksheet in order to aid the president in announcing the sentence of the court.

MJ: Defense Counsel, do you have any objections to the Sentence Worksheet?

DC: (Responds.)

MJ: Counsel, I intend to give the standard sentencing instructions. Do counsel have any requests for any special instructions?

TC/DC: (Respond.)

NOTE: Credit for Article 15 Punishment. If evidence of an Article 15 was admitted at trial which reflects that the accused received nonjudicial punishment for the same offense which the accused was also convicted at the court-martial, see paragraph 2-7-21, **CREDIT FOR ARTICLE 15 PUNISHMENT.**

MJ: (IF THE ACCUSED ELECTED NOT TO TESTIFY.) Does the defense desire that I give the instruction regarding the fact the accused did not testify?

NOTE: Unsworn statement instruction within discretion of MJ. See United States v. Breese, 11 MJ 17 (CMA 1981).

MJ: Call the members.

2-5-20. SENTENCING ARGUMENTS

MJ: The court is called to order. All parties present when the court recessed are again present.

MJ: Members of the court, counsel will now present argument on sentencing. Trial Counsel, you may argue.

TC: (Argument.)

MJ: Defense Counsel, you may present argument.

DC: (Argument.)

NOTE: If the DC concedes that a punitive discharge is appropriate, the MJ shall conduct an out-of-court hearing to ascertain if the accused knowingly and intelligently agrees with counsel's actions

with respect to a discharge. If the matter is raised before argument is made, the MJ should caution the DC to limit the request to a bad-conduct discharge. See paragraph 2-7-27 for procedural instructions on ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE.

2-5-21. SENTENCING INSTRUCTIONS

MJ: Members of the Court, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, (as well as to those in aggravation), you must bear in mind that the accused is to be sentenced only for the offense(s) of which (he) (she) has been found guilty.

MJ: (IF OFFENSES ARE ONE FOR SENTENCING PURPOSES) The offenses charged in _____ and _____ are one offense for sentencing purposes. Therefore, in determining an appropriate sentence in this case, you must consider them as one offense.

MJ: You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority. (A single sentence shall be adjudged for all offenses of which the accused has been found guilty.) (A separate sentence must be adjudged for each accused.)

NOTE: Confinement for Life without Eligibility for Parole: Whenever an accused is eligible to be sentenced to confinement for life for an offense occurring after 19 November 1997, the military judge must instruct that confinement for life without eligibility for parole is also a permissible punishment.

MJ: (MAXIMUM PUNISHMENT) The maximum punishment that may be adjudged in this case is:

a. Reduction to the grade of _____;

b. Forfeiture of ((2/3ds) (_____) pay per month for (12) (__) months) (all pay and allowances);

c. Confinement for _____; (and)

d. (A dishonorable discharge) (A bad-conduct discharge) (dismissal from the service.)

MJ: (IF MANDATORY MINIMUM): You are further advised that a sentence to (_____) is a mandatory minimum sentence for the offense of (_____).

MJ: The maximum punishment is a ceiling on your discretion. (With the exception of the mandatory minimum sentence to _____), (Y)ou are at liberty to arrive at any lesser legal sentence.)

MJ: In adjudging a sentence, you are restricted to the kinds of punishment that I will now describe ((IF NO MANDATORY MINIMUM SENTENCE) or you may adjudge no punishment). There are several matters that you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

2-5-22. TYPES OF PUNISHMENT

MJ: (REPRIMAND) This court may adjudge a reprimand, being in the nature of a censure. The court shall not specify the terms or wording of any adjudged reprimand.

MJ: (REDUCTION) This court may adjudge reduction to the lowest (or any intermediate) enlisted grade, either alone or in connection with any other kind of punishment within the maximum limitation. A reduction carries both the loss of military status and the incidents thereof and results in a corresponding reduction of military pay. You should designate only the pay grade to which the accused is to be reduced, rather than the rate or rank.

MJ: (EFFECT OF ARTICLE 58a) As a result of Article 58a of the Uniform Code of Military Justice, any approved sentence of an enlisted person in a pay grade above E1 that includes either a punitive discharge or confinement in excess of 3 months or 90 days automatically reduces that individual to the lowest enlisted pay grade, E1, by operation of the law. (Because (a dishonorable discharge) (and) (confinement for life with eligibility for parole) is the mandatory minimum sentence, the accused will automatically be reduced to E-1.) This is the first exception to which I referred earlier. Notwithstanding these provisions of Article 58a, this court may properly include an explicit sentence to a reduction to E1 (or any intermediate pay grade) as a part of any sentence, if the court believes that such a reduction should be part of the sentence.

MJ: (RESTRICTION) This court may adjudge restriction to limits for a maximum period not exceeding two months. For such a penalty, it is necessary for the court to specify the limits of the restriction and the period it is to run. Restriction to limits will not exempt an accused from any assigned military duty.

MJ: (HARD LABOR WITHOUT CONFINEMENT (enlisted only)) This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three months. Such hard labor would be performed in addition to other military duties which would normally be assigned. In the usual course of business, the immediate commanding officer assigns the amount and character of the hard labor to be performed.

NOTE: If the maximum authorized confinement is one month, the maximum hard labor without confinement that can be adjudged is 45 days.

MJ: (CONFINEMENT WITH NO MANDATORY MINIMUM) As I have already indicated, this court may sentence the accused to confinement for ((life without eligibility for parole) (life) (a maximum of __ (years) (months)). (Unless confinement for life without eligibility for parole or confinement for life is adjudged,) A sentence to confinement should be adjudged in either full days (or full months (or full years); fractions (such as one-half or one-third) should not be employed. (So, for example, if you do adjudge confinement, confinement for a month and a half should instead be expressed as confinement for 45 days. This example should not be taken as a suggestion, only an illustration of how to properly announce your sentence.)

NOTE: If confinement for life without eligibility for parole is an available punishment, instruct further as follows:

(You are advised that a sentence to “confinement for life without eligibility for parole” means that the accused will not be eligible for parole by any official, but it does not preclude clemency action, which might convert the sentence to one which allows parole. A sentence to “confinement for life” or any lesser confinement term, by comparison, means that the accused will have the possibility of earning parole from confinement under such circumstances as are or may be provided by law or regulations. “Parole” is a form of conditional release of a prisoner from actual incarceration before (his) (her) sentence has been fulfilled on specific conditions and under the possibility of return to incarceration to complete (his) (her) sentence to confinement if the conditions of parole are violated. In determining whether to adjudge “confinement for life without eligibility for parole” or “confinement for life” if either, you should bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating, clemency, or parole action by the convening authority or any other authority.)

NOTE: If a mandatory minimum sentence is required for an offense for which the accused is to be sentenced, use the following instructions (instead of the preceding instructions on confinement):

MJ: (CONFINEMENT WITH MANDATORY MINIMUM) You are advised that the law imposes a mandatory minimum sentence of confinement for life (with eligibility for parole) for the offense(s) of which the accused has been convicted.

Accordingly, the sentence you adjudge must include a term of confinement for life (with eligibility for parole). (You have the discretion to determine whether that confinement will be “with eligibility for parole” or “without eligibility for parole.”)

(A sentence to “confinement for life without eligibility for parole” means that the accused will be confined for the remainder of (his) (her) life and will not be eligible for parole by any official, but it does not preclude clemency action that might convert the sentence to one that allows parole.) A sentence to “confinement for life with eligibility for parole,” (by comparison,) means the accused will be confined for the rest of (his) (her) life, but (he) (she) will have the possibility of earning parole from such confinement, under such circumstances as are or may be provided by law or regulations. “Parole” is a form of conditional release of a prisoner from actual incarceration before (his) (her) sentence has been fulfilled, on specific conditions of exemplary behavior and under the possibility of return to incarceration to complete (his) (her) sentence of confinement if the conditions of parole are violated. (In determining whether to adjudge “confinement for life without eligibility for parole” or “confinement for life with eligibility for parole” in the sentence, bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating or clemency action by the convening authority or any higher authority, nor in the case of “confinement for life with eligibility for parole” in reliance upon future decisions on parole that might be made by appropriate officials.)

MJ: (PRETRIAL CONFINEMENT CREDIT, IF APPLICABLE): In determining an appropriate sentence in this case, you should consider that the accused has spent ___ days in pretrial confinement. If you adjudge confinement as part of your sentence, the days the accused spent in pretrial confinement will be credited against any sentence to confinement you may adjudge. This credit will be given by the authorities at the correctional facility where the accused is sent to serve (his) (her) confinement, and will be given on a day for day basis.

MJ: (FORFEITURES—ALL PAY AND ALLOWANCES): This court may sentence the accused to forfeit all pay and allowances. A forfeiture is a financial penalty that deprives an accused of military pay as it accrues. In determining the amount of forfeiture, if any, the court should consider the implications to the accused (and (his) (her) family) of such a loss of income. Unless a total forfeiture is adjudged, a sentence to a forfeiture should include an express statement of a whole dollar amount to be forfeited each month and the number of months the forfeiture is to continue. The accused is in pay grade E-___ with over ___ years of service, the total basic pay being \$_____ per month.

NOTE: As an option, the MJ may, instead of giving the oral instructions that follow, present the court members with a pay chart to use during their deliberations.

MJ: If reduced to the grade of E-___, the accused’s total basic pay would be \$_____.

If reduced to the grade of E-__, the accused's total basic pay would be \$_____.

If reduced to the grade of E-__, the accused's total basic pay would be \$_____.

If reduced to the grade of E-__, the accused's total basic pay would be \$_____.

If reduced to the grade of E-__, the accused's total basic pay would be \$_____.

MJ: This court may adjudge any forfeiture up to and including forfeiture of all pay and allowances.

MJ: (FORFEITURES—2/3DS ONLY) This court may sentence the accused to forfeit up to two-thirds pay per month for a period of (12) (__) months. A forfeiture is a financial penalty that deprives an accused of military pay as it accrues. In determining the amount of forfeiture, if any, the court should consider the implications to the accused (and (his) (her) family) of such a loss of income. A sentence to a forfeiture should include an express statement of a whole dollar amount to be forfeited each month and the number of months the forfeiture is to continue.

The accused is in pay grade E-__ with over __ years of service, the total basic pay being \$_____ per month. If retained in that grade, the maximum forfeiture would be \$_____ pay per month for (12) (__) months.

If reduced to the grade of E-__, the maximum forfeiture would be \$_____ pay per month for (12) (__) months.

If reduced to the grade of E-__, the maximum forfeiture would be \$_____ pay per month for (12) (__) months.

If reduced to the grade of E-__, the maximum forfeiture would be \$_____ pay per month for (12) (__) months.

If reduced to the grade of E-__, the maximum forfeiture would be \$_____ pay per month for (12) (__) months.

If reduced to the grade of E-__, the maximum forfeiture would be \$_____ pay per month for (12) (__) months.

MJ: (EFFECT OF ARTICLE 58b IN GCM) Any sentence that includes (either (1) confinement for more than six months or (2)) any confinement and a (punitive discharge) (dismissal) will require the accused, by operation of law, to forfeit all pay and allowances during the period of confinement. (Because (a dishonorable discharge) (a Dismissal) (and) (confinement for life with eligibility for parole) is

the mandatory minimum sentence, the accused will automatically forfeit all pay and allowances during any period of confinement you adjudge.) However, if the court wishes to adjudge any forfeitures of pay, or pay and allowances, the court should explicitly state the forfeiture as a separate element of the sentence.

MJ: (EFFECT OF ARTICLE 58b IN SPCM WHEN BCD AUTHORIZED) Any sentence that includes (either (1) confinement for more than six months or (2)) any confinement and a bad-conduct discharge will require the accused, by operation of law, to forfeit two-thirds of (his) (her) pay during the period of confinement. However, if the court wishes to adjudge any forfeitures of pay, the court should explicitly state the forfeiture as a separate element of the sentence.

MJ: (EFFECT OF ARTICLE 58b IN SPCM—BCD NOT AUTHORIZED) Any sentence that includes confinement for more than six months will require the accused, by operation of law, to forfeit two-thirds of (his) (her) pay during the period of confinement. However, if the court wishes to adjudge any forfeitures of pay, the court should explicitly state the forfeiture as a separate element of the sentence.

NOTE: The following optional instruction may be given in the discretion of the military judge or given in response to members' questions:

(MJ: (The) (trial) (and) (defense) counsel (has) (have) made reference to the availability (or lack thereof) of monetary support for the accused's family member(s). Again, by operation of law, if you adjudge:

(FOR GCM) (either (1) confinement for more than six months, or (2)) any confinement and a (punitive discharge) (Dismissal), then the accused will forfeit all pay and allowances due (him) (her) during any period of confinement.

(FOR SPCM WHEN BCD AUTHORIZED) (either (1) confinement for more than six months, or (2)) any confinement and a bad-conduct discharge, then the accused will forfeit two-thirds of all pay due (him) (her) during any period of confinement.

(FOR SPCM—BCD NOT AUTHORIZED) confinement for more than six months, then the accused will forfeit two-thirds of all pay due (him) (her) during any period of confinement.

However, when the accused has dependents, the convening authority may direct that any or all of the forfeiture of pay which the accused otherwise by law would be required to forfeit be paid to the accused's dependents for a period not to exceed six months. This action by the convening authority is purely discretionary. You should not rely upon the convening authority taking this action when considering an appropriate sentence in this case.

MJ: (FINE—GENERAL COURT-MARTIAL) This court may adjudge a fine either in lieu of or in addition to forfeitures. A fine, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence.

(In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed the maximum confinement for the offense(s) in this case.)

MJ: (FINE—SPECIAL COURT-MARTIAL) This court may adjudge a fine, either in lieu of or in addition to forfeitures. If you should adjudge a fine, the amount of the fine along with any forfeitures that you adjudge may not exceed the total amount of forfeitures which may be adjudged, that is, forfeiture of two-thirds pay per month for (six) (__) months(s). A fine when ordered executed makes the accused immediately liable to the United States for the entire amount of the fine.

(In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed __ (month(s)) (year).)

NOTE: Punitive discharges. A DD can be adjudged against noncommissioned warrant officers and enlisted persons only. A BCD may be adjudged only against enlisted persons. A dismissal may be adjudged only against commissioned officers, commissioned warrant officers, and cadets.

MJ: (PUNITIVE DISCHARGE) The stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages that are enjoyed by one whose discharge characterization indicates that (he) (she) has served honorably. A punitive discharge will affect an accused's future with regard to (his) (her) legal rights, economic opportunities, and social acceptability.

NOTE: Effect of punitive discharge on retirement benefits. The following instruction must be given if requested and the evidence shows any of the following circumstances exist: (1) The accused has sufficient time in service to retire and thus receive retirement benefits; (2) In the case of an enlisted accused, the accused has sufficient time left on his current term of enlistment to retire without having to reenlist; (3) In the case of an accused who is a commissioned or warrant officer, it is reasonable that the accused would be permitted to retire but for a punitive discharge. In other cases, and especially if the members inquire, the military judge should consider the views of counsel in deciding whether the following instruction, appropriately tailored, should be given or whether the instruction would suggest an improper speculation upon the effect of administrative or collateral consequences of the sentence. A request for an instruction regarding the effect of a

punitive discharge on retirement benefits should be liberally granted and denied only in cases where there is no evidentiary predicate for the instruction or the possibility of retirement is so remote as to make it irrelevant to determining an appropriate sentence. The military judge should have counsel present evidence at an Article 39(a) session or otherwise to determine the probability of whether the accused will reach retirement or eligibility for early retirement. Any instruction should be appropriately tailored to the facts of the case with the assistance of counsel and should include the below instruction. Even if the instruction is not required, the military judge nonetheless should consider giving the instruction and allowing the members to consider the matter. See United States v. Boyd, 55 MJ 217 (CAAF 2001); United States v. Luster, 55 MJ 67 (CAAF 2001); United States v. Greaves, 46 MJ 133 (CAAF 1997); United States v. Sumrall, 45 MJ 207 (CAAF 1996). When the below instruction is appropriate, evidence of the future value of retirement pay the accused may lose if punitively discharged is generally admissible. United States v. Becker, 46 MJ 141 (CAAF 1997).

(In addition, a punitive discharge terminates the accused's status and the benefits that flow from that status, including the possibility of becoming a military retiree and receiving retired pay and benefits.)

NOTE: Legal and factual obstacles to retirement. If the above instruction is appropriate, evidence of the legal and factual obstacles to retirement faced by the particular accused is admissible. If such evidence is presented, the below instruction should be given. United States v. Boyd, 55 MJ 217 (CAAF 2001).

(On the issue of the possibility of becoming a military retiree and receiving retired pay and benefits, you should consider the evidence submitted on the legal and factual obstacles to retirement faced by the accused.)

NOTE: Vested benefits. Before giving the optional instruction concerning vested benefits contained in the below instructions, see United States v. McElroy, 40 MJ 368 (CMA 1994).

MJ: (DISHONORABLE DISCHARGE AUTHORIZED/MANDATED) (This court may adjudge either a dishonorable discharge or a bad-conduct discharge.) (The law imposes a mandatory minimum sentence of a dishonorable discharge for the offense(s) of _____.) Such a sentence deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Department of the Navy. (However, vested benefits from a prior period of honorable service are not forfeited by receipt of a dishonorable discharge or a bad-conduct discharge that would terminate the accused's current term of service.) A dishonorable discharge should be reserved for those who in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of a

civil or military nature warranting such severe punishment. A bad-conduct discharge is a severe punishment, although less severe than a dishonorable discharge, and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature).

MJ: (ONLY BAD-CONDUCT DISCHARGE AUTHORIZED) This court may adjudge a bad-conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Department of the Navy. (However, vested benefits from a prior period of honorable service are not forfeited by receipt of a bad-conduct discharge that would terminate the accused's current term of service). A bad-conduct discharge is a severe punishment and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature.)

MJ: (DISMISSAL AUTHORIZED/MANDATED) (This court may adjudge a dismissal.) (The law imposes a mandatory minimum sentence of a dismissal for the offense(s) of _____.) You are advised that a sentence to a dismissal of a (commissioned officer) (cadet) is, in general, the equivalent of a dishonorable discharge of a noncommissioned officer, a warrant officer who is not commissioned, or an enlisted service member. A dismissal deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. It should be reserved for those who in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. Dismissal, however, is the only type of discharge the court is authorized to adjudge in this case.

MJ: (NO PUNISHMENT- GIVE ONLY IF NO MANDATORY MINIMUM) Finally, if you wish, this court may sentence the accused to no punishment.

2-5-23. OTHER INSTRUCTIONS

MJ: In selecting a sentence, you should consider all matters in extenuation and mitigation as well as those in aggravation, whether introduced before or after your findings. Thus, all the evidence you have heard in this case is relevant on the subject of sentencing.

MJ: You should consider evidence admitted as to the nature of the offense(s) of which the accused stands convicted, plus (as appropriate):

1. The accused's age.
2. The accused's good military character.
3. The accused's (record) (reputation) in the service for (good conduct) (efficiency) (bravery).

4. The prior honorable discharge(s) of the accused.
 5. The combat record of the accused.
 6. The (family) (domestic) difficulties experienced by the accused.
 7. The financial difficulties experienced by the accused.
 8. The accused's (mental condition) (mental impairment) (behavior disorder) (personality disorder).
 9. The accused's (physical disorder) (physical impairment) (addiction).
 10. The duration of the accused's pretrial confinement or restriction.
 11. The accused's GT score of _____.
 12. The accused's education, which includes: _____.
 13. That the accused is a graduate of the following service schools: _____.
 14. That the accused's (service records) indicate: _____.
 15. That the accused is entitled to wear the following medals and awards:
_____.
 16. Lack of previous convictions or nonjudicial punishment.
 17. Past performance and conduct in the Navy/USMC as reflected by _____.
 18. Character evidence—testimony of _____.
 19. (Accused's testimony _____.)
 20. (The accused's expression of his desire to remain in the service.)
 21. (That the accused has indicated that (he/she) does not desire a (BCD) (DD) (Dismissal).
 22. (Testimony of _____, _____, _____.)
- (MJ: Further, you should consider:
- (Previous convictions) _____.
- (Prior Article 15s) _____.
- (Prosecution exhibits, stipulations, etc.)
- (Rebuttal testimony of _____.
- (Nature of the weapon used in the commission of the offense.)
- (Nature and extent of injuries suffered by the victim.)
- (Period of hospitalization and convalescence required for victim.))

MJ: (ACCUSED NOT TESTIFYING:) The court will not draw any adverse inference from the fact that the accused did not elect to testify.

MJ: (ACCUSED NOT TESTIFYING UNDER OATH:) The court will not draw any adverse inference from the fact that the accused has elected to make a statement that is not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention of the court, and must be given appropriate consideration. The accused cannot be cross-examined by the prosecution or interrogated by court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

NOTE: SCOPE OF ACCUSED'S UNSWORN STATEMENT. The scope of an accused's unsworn statement is broad. United States v. Grill, 48 MJ 131 (CAAF 1998); United States v. Jeffrey, 48 MJ 229 (CAAF 1998); United States v. Britt, 48 MJ 233 (CAAF 1998). If the accused addresses collateral consequences (the treatment or sentence of others, command options, sex offender registration, or other matters) that would be inadmissible but for their being presented in an unsworn statement, the military judge can use the instruction below to "put the information in proper context by effectively advising the members to ignore it." US v. Talkington, 73 MJ 212 (CAAF 2014) (sex offender registration), citing US v. Barrier, 61 MJ 482 (CAAF 2005). In giving the instruction, the military judge must be careful not to suggest that the members should disregard the accused's unsworn statement.

MJ: The accused's unsworn statement included the accused's personal (thoughts) (opinions) (feelings) (statements) about (certain matters) (_____). An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense(s) of which the accused stands convicted. (Under DOD Instructions, when convicted of certain offenses, including the offense(s) here, the accused must register as a sex offender with the appropriate authorities in the jurisdiction in which he resides, works, or goes to school. Such registration is required in all 50 states; though requirements may differ between jurisdictions. Thus, specific requirements are not necessarily predictable.)

It is not your duty (to determine relative blameworthiness of (and whether appropriate disciplinary action has been taken against) others who might have

committed an offense, whether involved with this accused or not) (or) (to try to anticipate discretionary actions that may be taken by the accused's chain of command or other authorities) (or) (to attempt to predict sex offender registration requirements, or the consequences thereof) (_____).

While the accused is permitted to address these matters in an unsworn statement, these possible collateral consequences should not be part of your deliberations in arriving at a sentence. Your duty is to adjudge an appropriate sentence for this accused based upon the offense(s) for which (he) (she) has been found guilty that you regard as fair and just when it is imposed and not one whose fairness depends upon (actions that others (have taken) (or) (may or may not take) (in this case) (or) (in other cases)) (or) (possible requirements of sex offender registration, and the consequences thereof, at certain locations in the future).

MJ: (PLEA OF GUILTY) A plea of guilty is a matter in mitigation that must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government (have been) (usually are) saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.

MJ: (MENDACITY) The evidence presented (and the sentencing argument of trial counsel) raised the question of whether the accused testified falsely before this court under oath. No person, including the accused, has a right to seek to alter or affect the outcome of a court-martial by false testimony. You are instructed that you may consider this issue only within certain constraints.

First, this factor should play no role whatsoever in your determination of an appropriate sentence unless you conclude that the accused did lie under oath to the court.

Second, such lies must have been, in your view, willful and material, meaning important, before they can be considered in your deliberations.

Finally, you may consider this factor insofar as you conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

NOTE: When evidence of rehabilitative potential, defense retention evidence, or government rebuttal to defense retention evidence is introduced, the military judge should consider the following instructions, tailored to the specific evidence. See United States v. Eslinger, 70 MJ 193 (CAAF 2011); United States v. Griggs, 61 MJ 402 (CAAF 2005).

MJ: (IF REHABILITATIVE POTENTIAL EVIDENCE IS PRESENTED) You have heard testimony from (name witness(es)) indicating an opinion regarding the accused's rehabilitative potential. "Rehabilitative potential" refers to the accused's

potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society. You may consider this evidence in determining an appropriate sentence for the accused.

MJ: (IF DEFENSE RETENTION EVIDENCE IS PRESENTED) You have (also) heard testimony from (name witness(es)) indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (_____). The testimony of a witness indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (_____) is a matter in mitigation that you should consider in determining an appropriate sentence in this case.

MJ: (IF THERE IS REBUTTAL TO DEFENSE RETENTION EVIDENCE) In response to this evidence offered by the defense, you have heard testimony from (name witness(es)) indicating that the witness does not (desire to continue to serve with the accused) (desire to deploy with the accused) (_____). This evidence can only be considered for its tendency, if any, to rebut the defense evidence on this issue.

MJ: (CONCLUDING INSTRUCTIONS FOR ALL REHABILITATIVE POTENTIAL/RETENTION EVIDENCE) You may not consider testimony about (an accused's rehabilitative potential) (and) (whether a witness does (or does not) (desire to continue to serve with the accused) (desire to deploy with the accused) (_____)) as a recommendation regarding the appropriateness of a punitive discharge or any other specific sentence in this case, because no witness may suggest a specific punishment or sentence. (This rule does not apply to (statements) (testimony) by the accused regarding personal requests he/she may make in relation to specific punishments.). Whether the accused should receive a punitive discharge or any other authorized legal punishment is a matter for you alone to decide in the exercise of your independent discretion based on your consideration of all the evidence.

MJ: (ARGUMENT FOR A SPECIFIC SENTENCE) During argument, trial counsel recommended that you consider a specific sentence in this case. You are advised that the arguments of the trial counsel and (her) (his) recommendations are only (her) (his) individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel. In contrast, you are advised that the defense counsel is speaking on behalf of the accused.

2-5-24. CONCLUDING SENTENCING INSTRUCTIONS

MJ: When you close to deliberate and vote, only the members will be present. I remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make communications to or receive communications from anyone outside the deliberations room, by telephone or otherwise. Should you need to take a recess or have a question, or

when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known. Your deliberations should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of members in the exercise of their judgment.

When you have completed your discussion, then any member who desires to do so may propose a sentence. You do that by writing out on a slip of paper a complete sentence. ((IF MANDATORY MINIMUM SENTENCE) Once again, I advise you that any proposed sentence must include at least (confinement for life with eligibility for parole)(dismissal)(dishonorable discharge)(_____). The junior member collects the proposed sentences and submits them to the president, who will arrange them in order of their severity.

You then vote on the proposed sentences by secret written ballot. All must vote; you may not abstain. Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is two-thirds or ___ members. (A sentence that includes (confinement for life without eligibility for parole, or confinement for life, or) confinement in excess of ten years requires the concurrence of three-fourths or __ members.)

Number of Members	Two-Thirds	Three-fourths	Number of Members	Two-Thirds	Three-Fourths
3	2	N/A	8	6	6
4	3	N/A	9	6	7
5	4	4	10	7	8
6	4	5	11	8	9
7	5	6	12	8	9

The junior member will collect and count the votes. The count is then checked by the president who shall announce the result of the ballot to the members. If you vote on all of the proposed sentences without arriving at the required concurrence, you may then repeat the process of discussion, proposal of sentences, and voting. But once a proposal has been agreed to by the required concurrence, then that is your sentence.

You may reconsider your sentence at any time prior to its being announced in open court. If after you determine your sentence, any member suggests you reconsider the sentence, open the court and the president should announce that reconsideration has been proposed without reference to whether the proposed rebalot concerns increasing or decreasing the sentence. I will give you specific instructions on the procedure for reconsideration.

NOTE: See paragraph 2-7-19, RECONSIDERATION INSTRUCTION (SENTENCE).

MJ: As an aid in putting the sentence in proper form, the court may use the Sentence Worksheet marked Appellate Exhibit ____, which the Bailiff may now hand to the president.

BAILIFF: (Complies.)

MJ: Please use extreme care in completing this worksheet and in selecting the sentence form that properly reflects the sentence of the court. If you have any questions concerning sentencing matters, you should request further instructions in open court in the presence of all parties to the trial. In this connection, you are again reminded that you may not consult the Manual for Courts-Martial or any other publication or writing not properly admitted or received during this trial. These instructions must not be interpreted as indicating an opinion as to the sentence that should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select the sentence that will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. When the court returns, I will examine the Sentence Worksheet. The president will then announce the sentence.

MJ: Do counsel object to the instructions as given or request other instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions?

MBR: (Responds.)

MJ: (President), if you desire a recess during your deliberations, we must first formally reconvene the court and then recess. Knowing this, do you desire to take a brief recess before you begin deliberations or would you like to begin immediately?

PRES: (Responds.)

MJ: Bailiff, please give the president Prosecution Exhibit(s) ____ (and Defense Exhibit(s) ____).

BAILIFF: (Complies.)

MJ: (President), please do not mark on any of the exhibits, except the Sentence Worksheet .

TC: (Complies.)

MJ: The court is closed for deliberations.

2-5-25. POST-TRIAL AND APPELLATE RIGHTS ADVICE

MJ: This Article 39(a) session is called to order.

MJ: (Defense counsel), may I have the appellate rights statement please?

DC: Yes/No, your honor.

DC: Your honor, the appellate rights statement has been marked as Appellate Exhibit ____, and I hand it now to the military judge.

MJ: (Accused), I have here Appellate Exhibit ____, the appellate rights statement. Is this your signature at end of this document?

ACC: Yes/No, your honor.

MJ: Before you signed this document, did you read it over carefully and discuss all your appellate rights with your counsel?

ACC: Yes/No, your honor.

MJ: Do you understand all of your appellate rights?

ACC: Yes/No, your honor.

MJ: Appellate Exhibit ____ indicates your request concerning service of the record of trial (and the recommendation of the staff judge advocate/legal officer to be delivered to: _____. Appellate Exhibit __ will be attached to the record.

NOTE: If more than one DC, the MJ should determine which counsel will be responsible for post-trial actions and upon whom the staff judge advocate's post-trial recommendation is to be served.

MJ: This 39(a) session will now end while we await the sentence.

2-5-26. ANNOUNCEMENT OF SENTENCE

MJ: The court will come to order. All parties present when the court closed are again present, with the exception of the members. Bailiff, please call the members.

(President), has the court determined a sentence in this case?

PRES: (Responds.)

NOTE: If the president indicates that the members are unable to agree on a sentence, the MJ should give 2-7-18, "HUNG JURY" INSTRUCTION.

MJ: (President), is the sentence reflected on the Sentence Worksheet?

PRES: (Responds.)

MJ: Please (place it in the folder)/(fold it over) and hand it to the Bailiff. Bailiff, please bring me the sentence worksheet.

BAILIFF: (Complies.)

MJ: I have reviewed the Sentence Worksheet and it appears (to be in proper form) (_____). Bailiff, you may return it to the president.

BAILIFF: (Complies.)

MJ: Accused and counsel, please rise. (President), please announce the sentence of the court.

PRES: (Complies.)

MJ: Please be seated. Members of the court, you have now completed your duties. Please leave all the exhibits behind. You may take your personal notes with you or leave those behind and they will be destroyed by the court reporter.

MJ: Before I excuse you, let me advise you of one matter. To assist you in determining what you may discuss about this case now that it is over, I remind you of the oath you took as a court member. Essentially, the oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. This prohibition also includes any such disclosure on social networking or other internet sites. You may, of course, discuss your personal observations of the trial and the process of how a court-martial functions, but not what was discussed during your deliberations.

MJ: Your deliberations are carried on in the secrecy of the deliberation room to permit the utmost freedom of debate and so that each of you can express your views without fear of being subjected to criticism by the accused, the public, the convening authority, or anyone else. In deciding whether to answer questions about this case, and if so, what to disclose, you should have in mind your own interests and the interests of the other members of the court. Does any member have any questions at this time?

MBRs: (Respond.)

MJ: Members of the court, again, I want to thank you for your attendance and service in this case. You may now depart the courtroom and resume your normal duties.

(Members depart the courtroom.)

NOTE: If a pretrial agreement exists, continue below. The MJ must ensure that all parties have the same understanding concerning the operation of the sentence limitation portion on the sentence of the court; otherwise, the plea may be improvident. If no pretrial agreement exists, see next NOTE below.

**MJ: (Accused), we are now going to discuss the operation of your pretrial agreement on the sentence of the court. My understanding of the effect of the pretrial agreement on the sentence the court adjudged is as follows: (describe each element of the sentence and the impact, if any, of the pretrial agreement).
MJ: Do counsel agree with the court's interpretation of the sentence limitation portion of the pre-trial agreement?**

TC/DC: (Responds.)

MJ: (Accused), is that your understanding?

ACC: (Responds.).

MJ: Do you have any questions at all about the effect of your pretrial agreement on the sentence adjudged by the court-martial?

ACC: (Responds.).

NOTE: In all cases, continue below.

MJ: Are there any other matters to take up before this court adjourns?

TC/DC: (Respond.)

MJ: This court is adjourned.

Section VI
Court Members (Sentencing Only)

Before calling the members, the military judge should discuss with counsel any preliminary matters, trial procedures, and evidentiary issues that can be considered prior to assembly. Address and, when necessary, mark the following:

1. Cleansed charge sheet (verify defense opportunity to review)
2. Court-martial member questionnaires (verify defense opportunity to review)
3. Combined TC / DC witness list
4. MJ voir dire questions
5. TC / DC requested voir dire
6. TC / DC request for sentencing instructions
7. Identify the Accused's company-sized unit (enlisted only)
8. Pre-admission of Prosecution exhibits as appropriate
9. Pre-admission of Defense exhibits as appropriate
10. Applicable motions
11. Judicial notice
12. Stipulations
13. Members' folders (convening order and any modifications; cleansed
14. charge sheet w/MJ approval; question forms, note pads and pen)
15. Members' name plates, water, and cups provided
16. Sentencing worksheet
17. Wheeler Factors for sentencing

MJ: This Article 39(a) session is called to order. All parties are present, except the court members.

MJ: (Accused), we now enter into the sentencing phase of the trial where you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or yourself that you want the court to consider in deciding your sentence. Included in your right to present such matters are the rights you have to testify under oath, to make an unsworn statement, or to remain silent. If you testify under oath, you may be cross-examined by the trial counsel and questioned by me and the members. If you decide to make an unsworn statement, you may not be cross-examined by trial counsel or questioned by me or the members. However, the prosecution does have the right to rebut any statement of fact in your unsworn statement. You may make an unsworn statement orally or in writing, personally, or through your counsel, or you may use a combination of these ways. If you decide to exercise your right to remain silent, that cannot be held against you in any way. Do you understand your right to present matters on sentencing?

ACC: (Responds.)

MJ: Are there any corrections or additions to the personal data listed on the charge sheet?

TC/DC: (Respond.)

MJ: Counsel, what do you calculate to be the maximum sentence authorized (and the minimum punishment required)?

TC/DC: (Respond.)

MJ: Defense Counsel, has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13?

DC: (Responds.)

MJ: (Trial Counsel) what is your calculation of credit for pretrial confinement?

TC: (Respond.)

DC: Defense concurs/does not concur.

MJ: The Court orders _____ days of credit for pretrial confinement. The trial counsel will read the accused's personal data to the members at the appropriate time except for the SSN.

MJ: Counsel, do you have any documentary evidence on sentencing that could be marked and offered at this time?

TC/DC: (Comply.)

MJ: Is there anything else by either side?

TC/DC: (Respond.)

MJ: Bailiff, ask all the members to enter the courtroom.

(Members enter courtroom.)

MJ: Everyone may be seated. This (general/ special) court-martial will come to order in the case of United States versus (Accused). Trial counsel please state the jurisdictional data for this court-martial.

TC: This court is convened by (convening authority) by (General)/(Special) court-martial convening order (number) dated __, 20__ (as amended by _____), copies of which have been furnished to each member.

The accused, (rank/rate, name, service, unit), and the following persons detailed to this court-martial are present:

(Rank, name, service), as military judge;

(Rank, name, service), as TC / assistant TC;

(Rank, name, service), as DC / IMC / CC / assistant DC; and,

(Rank/rate, name, service), as members.

MJ: Members, please review the convening order (and modification(s)) in your folder and ensure that your name appears on the convening order with the correct rank (and rate), initials, spelling of your last name, (staff corps or warfare designation, if applicable)(and your branch of service). Please look up at me when you have completed your review.

(After opportunity for review) Does a correction need to be made to any member's information, if so, please raise your hand.

MBR: (Response, if any)

MJ: (A negative response by all members.) (The trial counsel is directed to make the correction(s) to the convening order.)

MJ: The members will now be sworn. All persons in the courtroom, please rise.

TC: As I call your name, please raise your right hand. Do you, (Members named by seniority), (swear) (or affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court-martial upon the (findings or) (sentence) unless required to do so in due course of law, so help you God? If your answer is in the affirmative, please state "I do".

MBR: I do.

MJ: Everyone may be seated. This (general / special) court-martial is assembled. Trial Counsel, is the government ready to proceed?

TC: Yes/No, your honor. The prosecution is ready to proceed with trial in the case of United States versus (Rank and Name of Accused). The general nature of the charge(s) in this case is (are): _____. The charge(s) was (were) preferred by (accuser) and has (have) been properly referred to this court-martial for trial by (convening authority), the convening authority.

2-6-1. PRELIMINARY INSTRUCTIONS

MJ: Members of the court, it is appropriate that I give you some preliminary instructions. It is my duty, as military judge, to ensure this trial is conducted in a fair and orderly manner. I preside over all sessions of court, rule on all objections and other legal issues and will instruct you on the law to be applied in this case. You are required to follow the court's instructions on the law and may not consult any other source as to the law pertaining to this case, unless I instruct you otherwise or it is admitted into evidence. This rule applies throughout the trial, including closed session deliberations and periods of recess. Any questions you have for me must be asked in open court. In this

case, the United States is represented by the trial counsel, (name(s)), and (name of accused) is represented by the defense counsel, (name(s)). ((Name of VLC), represents (name of victim) as legal counsel).

During the course of this trial, you may see counsel in the hallway or in the proximity of the building while we are not in session. Counsel will not speak to you, except perhaps to exchange the appropriate greeting of the day. Counsel are not being rude; for professional reasons, they are directed to avoid talking with you to eliminate even the appearance of impropriety.

At an earlier session of this court, the accused pled guilty to the charge(s) and specification(s) which you have before you. I accepted that plea and entered findings of guilty. Therefore, you will not have to determine whether the accused is guilty or not guilty as that has been established by (his) (her) plea. Your duty is to determine an appropriate sentence. That duty is a grave responsibility requiring the exercise of wise discretion. Your determination must be based upon all the evidence presented and the instructions I will give you as to the applicable law. Since you cannot properly reach your determination until all the evidence has been presented and you have been instructed, it is of vital importance that you keep an open mind until all the evidence and instructions have been presented to you. You may not have any preconceived idea or formula as to either the type or the amount of punishment that should be adjudged. You must first hear the evidence in aggravation, if any, and extenuation and mitigation, the law with regard to sentencing, and again only when you are in your closed session deliberations may you properly make a determination as to an appropriate sentence after considering all of the punishments that I would later explain.

While you are in your closed session deliberations, only the members will be present, you must remain together, and you may not allow any unauthorized intrusion into your deliberations. Each of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you. The senior member's vote counts as one, the same as the junior member's. In addition to the duties of the other members, the senior member will act as your presiding officer during your closed session deliberations and will speak for the panel in announcing the results.

I anticipate the following general order of events in this case: questioning of the members, excusals, presentation of evidence, sentencing argument of counsel, instructions on the law, deliberations and announcement of the sentence. (I anticipate this case will last _____ days.) Careful attention to all that occurs during the trial is required of all parties. The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Are there any questions over these preliminary matters? If so, please raise your hand.

MBRs: (Respond.)

MJ: [If no questions] Negative response from the members.

MJ: Members, please review the charge(s) and specification(s) before you (in your folder) at this time. When you are done with your review, please look up at me so I know you are done.

MJ: Members, have each of you had an enough time to review the charge(s) and specification(s), if so, please indicate yes by raising your hand?

MBRs: (Respond.)

2-6-2. VOIR DIRE

MJ: In a moment, I will ask you some questions. Counsel (will/may) also be given an opportunity to ask you questions. If you know of any matter that you believe might affect your impartiality as a member in this case, you must disclose that matter when asked. Bear in mind that any statement you make should be made in general terms so as not to disqualify other members who hear the statement. For example, if you have read a report of investigation of (the) (any) incident alleged in the specification(s), you should so state. Do not, however, state in front of the other members either what the report said or any opinion or conclusion you may have arrived at as a result of having read it. If you believe that what you say might disqualify the other members who hear it, you should request to make a statement outside their presence. Some of the grounds for challenge would be if you were the accuser in this case, if you had investigated any offense charged, if you had formed or expressed an opinion as to an appropriate sentence. (Also, as to the enlisted member(s), if you belong to the same company-sized unit as the accused, that is, (unit), that would be a ground for disqualification.)

MJ: Questions by counsel and the court are not asked to embarrass anyone, and they are not an attack on anyone's integrity; rather, they are asked in order to determine if a legal basis for challenge exists for excusing you from this case. It is no adverse reflection upon a panel member to be excused from a particular case.

MJ: You may be questioned either individually or collectively, but in either event you should indicate an individual response to the questions asked. Unless I indicate otherwise, you are required to answer all questions.

MJ: Members, the Court will now put some questions to you as a panel (and then allow counsel for each party the opportunity to pose additional questions). If your response is "yes," then raise your hand

- 1. Do any of you know the accused in this case, (Accused)?**
- 2. (If applicable) Does anyone know any person named in any of the specifications?**

3. Do you know me, or any of the counsel in this case?
4. Have any of you ever spoken with either counsel?
5. [If enlisted accused]. The accused is in (company sized unit). Are any of the enlisted members in the same unit?
6. Please find your notes pages and a pen/pencil. If you know any of the persons I'm about to list, please make a note, and we'll ask some follow-up questions. The following individuals may be called as witnesses in this case: (names & commands). Do any of you know any of these witnesses?
 - a. Whom do you know?
 - b. Do you know (name of witness) in a work or social context?
 - c. Without being specific, has anything occurred during this acquaintance that would cause you to be more or less inclined to believe him/her under oath than a witness you did not know?
7. Does anyone have any prior knowledge of the facts or events in this case?
8. Has anyone mentioned anything to you, or have you read anything, about the incidents alleged in the charge sheet before you?
 - a. **Note: If this case is related to another case, inquire into the knowledge of the members as to the related case. Any specific knowledge of either case should be delayed until individual voir dire.**
9. Have you, any member of your family, or anyone whom you work with or know well ever been accused of an offense similar to any of those on the charge sheet?
10. (If appropriate) Have you, any member of your family, or anyone whom you work with or know well ever been the victim of an offense similar to any of those charged in this case?
 - a. **NOTE: If Question 9 or 10 are answered in the affirmative, the military judge may want to ask any follow-up questions outside the hearing of the other members, depending on the nature of the charged offenses.**
11. If so, will that experience influence the performance of your duties as a court member in this case in any way?

12. Do any of you have immediate family members who are law enforcement officers, prosecuting or defense attorneys, or otherwise employed in law enforcement activities?
13. Having seen the accused and having read the charge(s) and specification(s), does anyone believe that you cannot give the accused a fair sentencing hearing for any reason?
14. Do any of you have any racial or ethnic biases or prejudices, or any religious beliefs or religious biases that would in any way prevent you from giving this accused, faced with these charges, a fair trial?
15. Do any of you sign, prepare, or provide information for the evaluation or fitness reports of any other court member?

Note: If so, the military judge may want to ask questions 16 and 17 during individual voir dire.

16. (To junior) Will you feel inhibited or restrained in any way in performing your duties as a court member, including the free expression of your views during deliberation, because another member holds a position of authority over you?
17. (To senior) Will you be restrained or embarrassed in any way in performing your duties as a court member if a member over whom you hold a position of authority should disagree with you?
18. Each court member is entitled to an equal voice and vote with all other members regardless of rate, grade, or rank. Influence through the use of grade, rank, position, or command is prohibited. Is there any member who cannot follow this instruction?
19. It is a ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime(s) for which the accused is to be sentenced. Does any member, having read the charge(s) and specification(s), believe that you would be compelled to vote for any particular punishment solely because of the nature of the charge(s)?
20. Before you begin your deliberations, I will instruct you on the full range of punishments (from no punishment) up to the maximum punishment. You should consider all forms of punishment within that range. Consider doesn't necessarily mean that you would vote for that particular punishment. Consider means that you think about and make a choice in your mind, one way or the other, as to whether that's an appropriate punishment. Each member must keep an open mind and not make a choice, nor foreclose from consideration any possible sentence, until the

closed session for deliberations and voting on the sentence. Can each of you follow this instruction?

21. Can each of you be fair, impartial, and open-minded in your consideration of an appropriate sentence in this case?
22. Can each of you reach a decision on a sentence on an individual basis in this particular case and not solely upon the nature of the offense (or offenses) of which the accused has been convicted?
23. Is there anything at all in your past education, training, or experience, or any other matter, that you feel you would not be able to set aside and conduct your deliberations in a completely fair, impartial and unbiased manner?

ADD FOR SEXUAL HARRASSMENT or DRUG OFFENSES

24. From your training and performance of assigned military duties, you are aware that the service has established administrative procedures for dealing with military personnel who engage in actions similar to those on the charge sheet before you that involve (sexual harassment) (drug abuse). These administrative procedures are sometimes referred to as "zero tolerance." Such administrative procedures must be disregarded by you in this criminal trial, and you must base your decision of an appropriate sentence solely on the evidence presented in this courtroom and the instructions that I will give you. Is there any member who cannot follow this instruction?

MJ: [Optional] Do counsel for either party request any group voir dire of the members?

TC/DC: (Respond.)

NOTE: Counsel conduct group voir dire within discretion of MJ.

MJ: [After counsel group voir dire and before individual voir dire] Now, taking into consideration all of the questions that have been asked, your responses and the responses of the other members, and everything else that has been brought out during these proceedings to this point, do any of you now feel that, for any reason, you would be unable to fairly and impartially determine all the issues in this case in accordance with the evidence, my instructions, and the applicable law?

MJ: [If no response] Negative response from the members.

MJ: Members at this time, please depart the courtroom for the deliberation room while I address some matters with counsel. (I anticipate that some or all of you

may be called back into the courtroom individually to be asked additional questions based on your questionnaires or responses to the questions just asked of you). I appreciate your patience during this process.
(Members depart.)

2-6-3. INDIVIDUAL VOIR DIRE

MJ: All the members are absent. All other parties are present. Trial Counsel, do you request individual voir dire and if so, state the member and your reason(s).

TC: (Responds.)

MJ: Defense Counsel, do you request individual voir dire and if so, state the member and your reason(s).

DC: (Responds.)

(At MJ discretion, allow TC/DC to conduct individual voir dire.)

2-6-4. CHALLENGES

NOTE: Challenges are to be made outside the presence of the court members in an Article 39(a) session. RCM 912 encompasses challenges based upon both actual bias and implied bias. United States v. Clay, 64 MJ 274, 276 (CAAF 2007). Military Judges should analyze all challenges for cause under both actual and implied bias theories, even if the counsel do not specifically use these terms. The burden of establishing the basis for a challenge is on the party making the challenge.

Actual Bias: The test for actual bias is whether the member's bias will not yield to the evidence presented and the judge's instructions. The question of whether a member is actually biased is a question of fact; accordingly, the military judge's ability to watch the challenged member's demeanor during voir dire make the military judge

specially situated in making this determination. United States v. Terry, 64 MJ 295 (CAAF 2007).

Implied Bias: Implied bias exists when, despite a disclaimer, most people in the same position as the court member would be prejudiced. United States v. Napolitano, 53 MJ 162 (CAAF 2000). In determining whether implied bias is present, military judges look to the totality of the circumstances. United States v. Strand, 59 MJ 455, 459 (CAAF 2004). Implied bias is viewed objectively, through the eyes of the public. Implied bias exists if an objective observer would have substantial doubt about the fairness of the accused's court-martial panel. Because of the objective nature of the inquiry, appellate courts accord less deference to implied bias determinations of a military judge. United States v. Armstrong, 54 MJ 51, 54 (CAAF 2000).

Liberal Grant Mandate: In close cases, military judges are enjoined to liberally grant defense challenges for cause. United States v. Clay, 64 MJ 274 (CAAF 2007). Where a military judge does not indicate on the record that he/she has considered the liberal grant mandate during the evaluation for implied bias of a defense challenge for cause, the appellate courts will accord that decision less deference during review of the ruling. Therefore, when ruling on a defense challenge for cause, the military judge should (1) state that s/he has considered the challenge under both actual and implied bias theories and is aware of the duty to liberally grant defense challenges; and (2) place the reasoning on the record. United States v. Townsend, 65 MJ 460, 464 (CAAF 2008). The following is a suggested procedure for an Article 39(a) session.

MJ: All the members are absent. Trial Counsel, do you have any challenges for cause?

TC: (Responds.)

MJ: (IF A CHALLENGE IS MADE) Defense Counsel, do you object?

DC: (Responds.)

MJ: (Granted/Denied.)

MJ: Defense Counsel, do you have any challenges for cause?

DC: (Responds.)

MJ: (IF A CHALLENGE IS MADE) Trial Counsel, do you object?

TC: (Responds.)

MJ: (IF THE MJ IS GRANTING THE CHALLENGE) MJ: The challenge is granted.

MJ: (FOR EACH CHALLENGE THE MJ IS DENYING) I have considered the challenge for cause on the basis of both actual and implied bias and the mandate to liberally grant defense challenges. The challenge is denied because (_____).

NOTE: If a challenge reduces the court below quorum, see Article 41 and 2-7-26 to determine the proper course of action. The proper COA depends on several factors: 1) what type of challenge brought the panel below quorum; 2) has either side exercised a peremptory challenge; 3) is the panel below Art 16 quorum (3/5/12) or below Art 25 quorum (1/3 enlisted); and, 4) if it's an Art 25 issue, could peremptory challenges potentially "fix" the problem. See also, *United States v. Dobson*, 63 M.J. 1 (C.A.A.F. 2006).

(Quorum count matrix)

Members Remaining	Enlisted Minimum	Members Remaining	Enlisted Minimum
12	4	7	3
11	4	6	2
10	4	5 (GCM Minimum)	2
9	3	4	2
8	3	3 (SPCM Minimum)	1

MJ: Trial Counsel, do you have a peremptory challenge?

TC: (Responds.)

MJ: Defense Counsel, do you have a peremptory challenge?

DC: (Responds.)

MJ: [If challenges reduce court below quorum] The court is now below the required quorum, and we cannot proceed until additional members are detailed. I am going to recess the court until that is accomplished. The members are excused until further notice. Call the members.

MJ: [If any member is excused] (Name(s) of member(s)), you are excused from further participation in this case and may return to your normal duties. Thank you for your attention to your duty here today.

[NOTE: After any excused members have withdrawn, seating should be rearranged by seniority]

9	7	5	3	1	PRESIDENT	2	4	6	8	10
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2-6-5. SENTENCING PROCEEDINGS

MJ: All parties are present including the members (with the exception of those who have been excused).

MJ: Members, the following procedural instructions will apply throughout the trial. When a witness is called, the counsel who calls the witness will question the witness first. Then the opposing counsel will be given a chance to ask questions. In the event counsel makes an objection to a question or item of evidence and the court sustains the objection, you must completely disregard the question or the item of evidence. The alternative is that I might overrule an objection, in which case you may consider the question or item of evidence. When counsel have finished, if you believe there are relevant questions that you would like me to ask the witness, you will be given an opportunity to do so. Write out your questions on the form provided in your folder and sign it at the bottom. This method gives us an opportunity to review the question before it is asked, since your questions, like mine and questions of counsel, are subject to objection. Please ensure your questions are relevant to the issues before this court and are not biased to aid one party or the other. Do not allow any other member to see your question. Whether or not a question is asked, it will be attached to the record as an appellate exhibit. Bear in mind that the counsel are responsible for preparing and presenting their cases. In questioning witnesses, you must not become an advocate for either side.

MJ: Throughout the trial, including periods of recess or adjournment, you must not communicate with anyone about the case either in person or by electronic media or other similar form of communication. You must not listen to or read any accounts of this hearing from any source. Do not visit the scene of any incident described on the charge sheet or mentioned during the sentencing hearing. Do not consult any source of law or information on the internet, written, or otherwise as to matters involved in the case and do not conduct your own investigation or research. Until this case is over you are prohibited from posting anything about this court-martial on any social network sites. Further, you must not discuss the case among yourselves. You must hold your discussion of the appropriate sentence in this case until you are all together in closed session deliberations. You must also avoid contact with witnesses or potential witnesses in this case, counsel, and the accused. If anyone attempts to discuss the case or communicate with you during any recess, you must immediately tell him or her to

stop and report the occurrence to me at the next session. I may not repeat these matters to you before every break or recess but, please keep them in mind throughout the trial.

MJ: Each of you may take notes, if you want, and use them to refresh your memory during deliberations, but they may not be read or shown to other members. At the time of any recess, to include an overnight recess, leave your notes face down or covered and the court-reporter will safeguard them for you.

MJ: Are there any questions over these preliminary matters? If so, please raise your hand.

MBR: (Response, if any.)

MJ: Members of the Court, at this time we will begin the sentencing phase of the trial.

MJ: Trial Counsel, you may read the personal data concerning the accused to the members.

TC: (Reads personal data)

MJ: Members, I have previously admitted into evidence (Prosecution Exhibit(s) __, which (is) (are) _____) (and) (Defense Exhibit(s) __, which (is) (are) _____). You will have (this) (these) exhibit(s) available to you during your deliberations. (Trial Counsel, you may read the stipulation of fact into evidence.) Trial Counsel, do you have anything else to present at this time?

MJ: You may proceed.

COMMON WARNINGS/INSTRUCTIONS DURING TESTIMONY

WARNING TO WITNESSES

NOTE: After a witness testifies, the MJ should instruct the witness along the following lines:

MJ: _____, you are excused (temporarily) (permanently). As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down and (return to the waiting room) (go about your duties) (return to your activities) (be available by telephone to return within __ minutes).

LIMITING INSTRUCTION ON EVIDENCE

NOTE: Provide an instruction along the following lines when evidence has been admitted for a limited purpose:

MJ: Members, (describe evidence/testimony) has been admitted into evidence for the limited purpose to show that (state reason). You are advised that you may consider this evidence solely for that purpose and for no other. Is there any member who cannot follow this instruction?

CURATIVE INSTRUCTION

NOTE: Provide an instruction along the following lines when improper matters have been revealed to the members:

MJ: Members, (describe evidence/ testimony) is an (improper/ incorrect) (questions/ testimony/ statement of the law). You are instructed that you must completely disregard that (question/ answer/ statement). You may not consider it for any purpose whatsoever. You must decide the issues in this case solely on the evidence that properly comes before you. Is there any member who cannot follow this instruction?

TC: The government rests.

MJ: Does any court member have questions of this witness?

NOTE: If the members have questions, the TC will collect the written questions, have them marked as appellate exhibits, examine them, show them to the DC, and present them to the MJ so that the MJ may ask the witness the questions.

MBRS: (Respond.)

TC: The government rests.

MJ: Defense Counsel, you may proceed.

NOTE: MRE 412 evidence offered in sentencing. MRE 412 applies in sentencing. United States v. Fox, 24 MJ 110 (CMA 1987); United States v. Whitaker, 34 MJ 822 (AFCCA 1992).

DC: (Responds and presents case on sentencing.)

DC: The defense rests.

2-6-6. REBUTTAL AND SURREBUTTAL, IF ANY

MJ: Trial Counsel, does the prosecution have a case in rebuttal?

TC: (Responds / presents case.)

MJ: Defense Counsel, any surrebuttal?

DC: (Responds / presents case.)

MJ: Members of the Court, you have now heard all the evidence. At this time, we need to have a hearing outside of your presence to go over the instructions that I will give you. I expect that you will be required to be present again at _____.

2-6-7. DISCUSSION OF SENTENCING INSTRUCTIONS

MJ: All parties are present except the court members, who are absent.

NOTE: If the accused did not testify or provide an unsworn statement, the MJ must ask the following question outside the presence of the members:

MJ: (Accused), you did not testify or provide an unsworn statement during the sentencing phase of the trial. Was it your personal decision not to testify or provide an unsworn statement?

ACC: (Responds.)

MJ: Trial Counsel, please mark the Sentence Worksheet as Appellate Exhibit ____, show it to the Defense, and present it to me.

TC: (Complies.)

NOTE: Listing of punishments. Only those punishments on which an instruction will be given should ordinarily be listed on the Sentence Worksheet. If all have agreed that a fine is not appropriate, then it ordinarily should not be listed on the worksheet. If a dishonorable discharge or a dismissal is a mandatory minimum sentence, then this punishment should be listed on the worksheet in order to aid the president in announcing the sentence of the court.

MJ: Defense Counsel, do you have any objections to the Sentence Worksheet?

DC: (Responds.)

MJ: Counsel, I intend to give the standard sentencing instructions. Do counsel have any requests for any special instructions?

TC/DC: (Respond.)

NOTE: Credit for Article 15 Punishment. If evidence of an Article 15 was admitted at trial which reflects that the accused received nonjudicial punishment for the same offense which the accused was also convicted at the court-martial, see paragraph 2-7-21, **CREDIT FOR ARTICLE 15 PUNISHMENT.**

MJ: (IF THE ACCUSED ELECTED NOT TO TESTIFY.) Does the defense desire that I give the instruction regarding the fact the accused did not testify?

NOTE: Unsworn statement instruction within discretion of MJ. See United States v. Breese, 11 MJ 17 (CMA 1981).

MJ: Call the members.

2-6-8. SENTENCING ARGUMENTS

MJ: Members of the court, counsel will now present argument on sentencing. (Trial counsel) may argue.

TC: (Argument.)

MJ: Defense Counsel, you may present argument.

DC: (Argument.)

NOTE: If the DC concedes that a punitive discharge is appropriate, the MJ shall conduct an out-of-court hearing to ascertain if the accused knowingly and intelligently agrees with counsel's actions with respect to a discharge. If the matter is raised before argument is made, the MJ should caution the DC to limit the request to a bad-conduct discharge. See paragraph 2-7-27 for procedural instructions on ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE.

2-6-9. SENTENCING INSTRUCTIONS

MJ: Members of the Court, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, (as well as to those in aggravation), you must bear in mind that the accused is to be sentenced only for the offense(s) of which (he) (she) has been found guilty.

MJ: (IF OFFENSES ARE ONE FOR SENTENCING PURPOSES:) The offenses charged in _____ and _____ are one offense for sentencing purposes. Therefore, in determining an appropriate sentence in this case, you must consider them as one offense.

MJ: You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority. (A single sentence shall be adjudged for all offenses of which the accused has been found guilty.) (A separate sentence must be adjudged for each accused.)

NOTE: Confinement for Life without Eligibility for Parole: Whenever an accused is eligible to be sentenced to confinement for life for an offense occurring after 19 November 1997, the military judge must instruct that confinement for life without eligibility for parole is also a permissible punishment.

MJ: (MAXIMUM PUNISHMENT) The maximum punishment that may be adjudged in this case is:

a. Reduction to the grade of _____;

b. Forfeiture of ((2/3ds) (_____) pay per month for (12) (__) months) (all pay and allowances);

c. Confinement for _____; (and)

d. (A dishonorable discharge) (A bad-conduct discharge) (dismissal from the service.)

MJ: (IF MANDATORY MINIMUM): You are further advised that a sentence to (_____) is a mandatory minimum sentence for the offense of (_____).

MJ: The maximum punishment is a ceiling on your discretion. (With the exception of the mandatory minimum sentence of _____,)(Y)ou are at liberty to arrive at any lesser legal sentence.

MJ: In adjudging a sentence, you are restricted to the kinds of punishment that I will now describe ((IF NO MANDATORY MINIMUM SENTENCE) or you may adjudge no punishment). There are several matters that you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

2-6-10. TYPES OF PUNISHMENT

MJ:(REPRIMAND) This court may adjudge a reprimand, being in the nature of a censure. The court shall not specify the terms or wording of any adjudged reprimand.

MJ: (REDUCTION) This court may adjudge reduction to the lowest (or any intermediate) enlisted grade, either alone or in connection with any other kind of punishment within the maximum limitation. A reduction carries both the loss of military status and the incidents thereof and results in a corresponding reduction

of military pay. You should designate only the pay grade to which the accused is to be reduced, rather than the rate or rank.

MJ: (EFFECT OF ARTICLE 58) As a result of Article 58a of the Uniform Code of Military Justice, any approved sentence of an enlisted person in a pay grade above E1 that includes either a punitive discharge or confinement in excess of 3 months or 90 days, automatically reduces that individual to the lowest enlisted pay grade, E1, by operation of the law. (Because (a dishonorable discharge) (and) (confinement for life with eligibility for parole) is the mandatory minimum sentence, the accused will automatically be reduced to E-1.) This is the first exception to which I referred earlier. Notwithstanding these provisions of Article 58a, this court may properly include an explicit sentence to a reduction to E1 (or any intermediate pay grade) as a part of any sentence, if the court believes that such a reduction should be part of the sentence.

MJ: (RESTRICTION) This court may adjudge restriction to limits for a maximum period not exceeding two months. For such a penalty, it is necessary for the court to specify the limits of the restriction and the period it is to run. Restriction to limits will not exempt an accused from any assigned military duty.

MJ: (HARD LABOR WITHOUT CONFINEMENT (enlisted only)) This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three months. Such hard labor would be performed in addition to other military duties which would normally be assigned. In the usual course of business, the immediate commanding officer assigns the amount and character of the hard labor to be performed.

NOTE: If the maximum authorized confinement is one month, the maximum hard labor without confinement that can be adjudged is 45 days.

MJ: (CONFINEMENT WITH NO MANDATORY MINIMUM) As I have already indicated, this court may sentence the accused to confinement for ((life without eligibility for parole) (life) (a maximum of __ (years) (months)). (Unless confinement for life without eligibility for parole or confinement for life is adjudged,) A sentence to confinement should be adjudged in either full days (or) full months (or full years); fractions (such as one-half or one-third) should not be employed. (So, for example, if you do adjudge confinement, confinement for a month and a half should instead be expressed as confinement for 45 days. This example should not be taken as a suggestion, only an illustration of how to properly announce your sentence.)

NOTE: If confinement for life without eligibility for parole is an available punishment, instruct further as follows:

(You are advised that a sentence to “confinement for life without eligibility for parole” means that the accused will not be eligible for parole by any official, but it does not preclude clemency action that might convert the sentence to one which allows parole. A sentence to “confinement for life” or any lesser confinement term, by comparison, means that the accused will have the possibility of earning

parole from confinement under such circumstances as are or may be provided by law or regulations. "Parole" is a form of conditional release of a prisoner from actual incarceration before (his) (her) sentence has been fulfilled on specific conditions and under the possibility of return to incarceration to complete (his) (her) sentence to confinement if the conditions of parole are violated. In determining whether to adjudge "confinement for life without eligibility for parole" or "confinement for life" if either, you should bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating, clemency, or parole action by the convening authority or any other authority.)

NOTE: If a mandatory minimum sentence is required for an offense for which the accused is to be sentenced, use the following instructions (instead of the preceding instructions on confinement):

MJ: (CONFINEMENT WITH MANDATORY MINIMUM) You are advised that the law imposes a mandatory minimum sentence of confinement for life (with eligibility for parole) for the offense(s) of which the accused has been convicted. Accordingly, the sentence you adjudge must include a term of confinement for life (with eligibility for parole). (You have the discretion to determine whether that confinement will be "with eligibility for parole" or "without eligibility for parole.")

(A sentence to "confinement for life without eligibility for parole" means that the accused will be confined for the remainder of (his) (her) life and will not be eligible for parole by any official, but it does not preclude clemency action that might convert the sentence to one that allows parole.) A sentence to "confinement for life with eligibility for parole," (by comparison,) means the accused will be confined for the rest of (his) (her) life, but (he) (she) will have the possibility of earning parole from such confinement, under such circumstances as are or may be provided by law or regulations. "Parole" is a form of conditional release of a prisoner from actual incarceration before (his) (her) sentence has been fulfilled, on specific conditions of exemplary behavior and under the possibility of return to incarceration to complete (his) (her) sentence of confinement if the conditions of parole are violated. (In determining whether to adjudge "confinement for life without eligibility for parole" or "confinement for life with eligibility for parole" in the sentence, bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating or clemency action by the convening authority or any higher authority, nor in the case of "confinement for life with eligibility for parole" in reliance upon future decisions on parole that might be made by appropriate officials.)

MJ: (PRETRIAL CONFINEMENT CREDIT, IF APPLICABLE) In determining an appropriate sentence in this case, you should consider that the accused has spent ___ days in pretrial confinement. If you adjudge confinement as part of your sentence, the days the accused spent in pretrial confinement will be credited against any sentence to confinement you may adjudge. This credit will be given

by the authorities at the correctional facility where the accused is sent to serve (his) (her) confinement, and will be given on a day for day basis.

MJ: (FORFEITURES—ALL PAY AND ALLOWANCES) This court may sentence the accused to forfeit all pay and allowances. A forfeiture is a financial penalty that deprives an accused of military pay as it accrues. In determining the amount of forfeiture, if any, the court should consider the implications to the accused (and (his) (her) family) of such a loss of income. Unless a total forfeiture is adjudged, a sentence to a forfeiture should include an express statement of a whole dollar amount to be forfeited each month and the number of months the forfeiture is to continue. The accused is in pay grade E-__ with over __ years of service, the total basic pay being \$_____ per month.

NOTE: As an option, the MJ may, instead of giving the oral instructions that follow, present the court members with a pay chart to use during their deliberations.

MJ: If reduced to the grade of E-__, the accused's total basic pay would be \$_____.

If reduced to the grade of E-__, the accused's total basic pay would be \$_____.

If reduced to the grade of E-__, the accused's total basic pay would be \$_____.

If reduced to the grade of E-__, the accused's total basic pay would be \$_____.

If reduced to the grade of E-__, the accused's total basic pay would be \$_____.

MJ: This court may adjudge any forfeiture up to and including forfeiture of all pay and allowances.

MJ: (FORFEITURES—2/3DS ONLY) This court may sentence the accused to forfeit up to two-thirds pay per month for a period of (12) (__) months. A forfeiture is a financial penalty that deprives an accused of military pay as it accrues. In determining the amount of forfeiture, if any, the court should consider the implications to the accused (and (his) (her) family) of such a loss of income. A sentence to a forfeiture should include an express statement of a whole dollar amount to be forfeited each month and the number of months the forfeiture is to continue.

The accused is in pay grade E-__ with over __ years of service, the total basic pay being \$_____ per month. If retained in that grade, the maximum forfeiture would be \$_____ pay per month for (12) (__) months.

If reduced to the grade of E-__, the maximum forfeiture would be \$ _____ pay per month for (12) (__) months.

If reduced to the grade of E-__, the maximum forfeiture would be \$ _____ pay per month for (12) (__) months.

If reduced to the grade of E-__, the maximum forfeiture would be \$ _____ pay per month for (12) (__) months.

If reduced to the grade of E-__, the maximum forfeiture would be \$ _____ pay per month for (12) (__) months.

If reduced to the grade of E-__, the maximum forfeiture would be \$ _____ pay per month for (12) (__) months.

MJ: (EFFECT OF ARTICLE 58b IN GCM) Any sentence that includes (either (1) confinement for more than six months or (2)) any confinement and a (punitive discharge) (dismissal) will require the accused, by operation of law, to forfeit all pay and allowances during the period of confinement. (Because (a dishonorable discharge) (a dismissal) (and) (confinement for life with eligibility for parole) is the mandatory minimum sentence, the accused will automatically forfeit all pay and allowances during any period of confinement you adjudge.) However, if the court wishes to adjudge any forfeitures of pay, or pay and allowances, the court should explicitly state the forfeiture as a separate element of the sentence.

MJ: (EFFECT OF ARTICLE 58b IN SPCM WHEN BCD AUTHORIZED) Any sentence that includes (either (1) confinement for more than six months or (2)) any confinement and a bad-conduct discharge will require the accused, by operation of law, to forfeit two-thirds of (his) (her) pay during the period of confinement. However, if the court wishes to adjudge any forfeitures of pay, the court should explicitly state the forfeiture as a separate element of the sentence.

MJ: (EFFECT OF ARTICLE 58b IN SPCM—BCD NOT AUTHORIZED) Any sentence that includes confinement for more than six months will require the accused, by operation of law, to forfeit two-thirds of (his) (her) pay during the period of confinement. However, if the court wishes to adjudge any forfeitures of pay, the court should explicitly state the forfeiture as a separate element of the sentence.

NOTE: The following optional instruction may be given in the discretion of the military judge initially or in response to members' questions:

(MJ: (The) (trial) (and) (defense) counsel (has) (have) made reference to the availability (or lack thereof) of monetary support for the accused's family member(s). Again, by operation of law, if you adjudge:

(FOR GCM) (either (1) confinement for more than six months, or (2)) any confinement and a (punitive discharge) (Dismissal), then the accused will forfeit all pay and allowances due (him) (her) during any period of confinement.

(FOR SPCM WHEN BCD AUTHORIZED) (either (1) confinement for more than six months, or (2)) any confinement and a bad-conduct discharge, then the accused will forfeit two-thirds of all pay due (him) (her) during any period of confinement.

(FOR SPCM—BCD NOT AUTHORIZED) confinement for more than six months, then the accused will forfeit two-thirds of all pay due (him) (her) during any period of confinement.

However, when the accused has dependents, the convening authority may direct that any or all of the forfeiture of pay which the accused otherwise by law would be required to forfeit be paid to the accused's dependents for a period not to exceed six months. This action by the convening authority is purely discretionary. You should not rely upon the convening authority taking this action when considering an appropriate sentence in this case.

MJ: (FINE—GENERAL COURT-MARTIAL) This court may adjudge a fine either in lieu of or in addition to forfeitures. A fine, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence.

(In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed the maximum confinement for the offense(s) in this case.)

MJ: (FINE—SPECIAL COURT-MARTIAL) This court may adjudge a fine, either in lieu of or in addition to forfeitures. If you should adjudge a fine, the amount of the fine along with any forfeitures that you adjudge may not exceed the total amount of forfeitures which may be adjudged, that is, forfeiture of two-thirds pay per month for (six) (__) months(s). A fine when ordered executed makes the accused immediately liable to the United States for the entire amount of the fine.

(In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed __ (month(s)) (year).)

NOTE: Punitive discharges. A DD can be adjudged against noncommissioned warrant officers and enlisted persons only. A BCD may be adjudged only against enlisted persons. A dismissal may be adjudged only against commissioned officers, commissioned warrant officers, and cadets.

MJ:(PUNITIVE DISCHARGE) The stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on

employment opportunities and will deny the accused other advantages that are enjoyed by one whose discharge characterization indicates that (he) (she) has served honorably. A punitive discharge will affect an accused's future with regard to (his) (her) legal rights, economic opportunities, and social acceptability.

NOTE: Effect of punitive discharge on retirement benefits. The following instruction must be given if requested and the evidence shows any of the following circumstances exist: (1) The accused has sufficient time in service to retire and thus receive retirement benefits; (2) In the case of an enlisted accused, the accused has sufficient time left on his current term of enlistment to retire without having to reenlist; (3) In the case of an accused who is a commissioned or warrant officer, it is reasonable that the accused would be permitted to retire but for a punitive discharge. In other cases, and especially if the members inquire, the military judge should consider the views of counsel in deciding whether the following instruction, appropriately tailored, should be given or whether the instruction would suggest an improper speculation upon the effect of administrative or collateral consequences of the sentence. A request for an instruction regarding the effect of a punitive discharge on retirement benefits should be liberally granted and denied only in cases where there is no evidentiary predicate for the instruction or the possibility of retirement is so remote as to make it irrelevant to determining an appropriate sentence. The military judge should have counsel present evidence at an Article 39(a) session or otherwise to determine the probability of whether the accused will reach retirement or eligibility for early retirement. Any instruction should be appropriately tailored to the facts of the case with the assistance of counsel and should include the below instruction. Even if the instruction is not required, the military judge nonetheless should consider giving the instruction and allowing the members to consider the matter. See United States v. Boyd, 55 MJ 217 (CAAF 2001); United States v. Luster, 55 MJ 67 (CAAF 2001); United States v. Greaves, 46 MJ 133 (CAAF 1997); United States v. Sumrall, 45 MJ 207 (CAAF 1996). When the below instruction is appropriate, evidence of the future value of retirement pay the accused may lose if punitively discharged is generally admissible. United States v. Becker, 46 MJ 141 (CAAF 1997).

(In addition, a punitive discharge terminates the accused's status and the benefits that flow from that status, including the possibility of becoming a military retiree and receiving retired pay and benefits.)

NOTE: Legal and factual obstacles to retirement. If the above instruction is appropriate, evidence of the legal and factual obstacles to retirement faced by the particular accused is admissible. If such

evidence is presented, the below instruction should be given. United States v. Boyd, 55 MJ 217 (CAAF 2001).

(On the issue of the possibility of becoming a military retiree and receiving retired pay and benefits, you should consider the evidence submitted on the legal and factual obstacles to retirement faced by the accused.)

NOTE: Vested benefits. Before giving the optional instruction concerning vested benefits contained in the below instructions, see United States v. McElroy, 40 MJ 368 (CMA 1994).

MJ: (DISHONORABLE DISCHARGE AUTHORIZED/MANDATED) (This court may adjudge either a dishonorable discharge or a bad-conduct discharge.) (The law imposes a mandatory minimum sentence of a dishonorable discharge for the offense(s) of _____.) Such a sentence deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Department of the Navy. (However, vested benefits from a prior period of honorable service are not forfeited by receipt of a dishonorable discharge or a bad-conduct discharge that would terminate the accused's current term of service.) A dishonorable discharge should be reserved for those who in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. A bad-conduct discharge is a severe punishment, although less severe than a dishonorable discharge, and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature).

MJ: (ONLY BAD-CONDUCT DISCHARGE ALLOWED) This court may adjudge a bad-conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Department of the Navy. (However, vested benefits from a prior period of honorable service are not forfeited by receipt of a bad-conduct discharge that would terminate the accused's current term of service). A bad-conduct discharge is a severe punishment and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature.)

MJ: (DISMISSAL AUTHORIZED/MANDATED) (This court may adjudge a dismissal.) (The law imposes a mandatory minimum sentence of a dismissal for the offense(s) of _____.) You are advised that a sentence to a dismissal of a (commissioned officer) (cadet) is, in general, the equivalent of a dishonorable discharge of a noncommissioned officer, a warrant officer who is not commissioned, or an enlisted service member. A dismissal deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Department of the Navy. It should be reserved for those who in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment.

Dismissal, however, is the only type of discharge the court is authorized to adjudge in this case.

MJ: (NO PUNISHMENT-GIVE ONLY IF NO MANDATORY MINIMUM) Finally, if you wish, this court may sentence the accused to no punishment.

2-6-11. OTHER INSTRUCTIONS

MJ: In selecting a sentence, you should consider all matters in extenuation and mitigation as well as those in aggravation, (whether introduced before or after your findings). (Thus, all the evidence you have heard in this case is relevant on the subject of sentencing.)

MJ: You should consider evidence admitted as to the nature of the offense(s) of which the accused stands convicted, plus:

1. The accused's age.
2. The accused's good military character.
3. The accused's (record) (reputation) in the service for (good conduct) (efficiency) (bravery).
4. The prior honorable discharge(s) of the accused.
5. The combat record of the accused.
6. The (family) (domestic) difficulties experienced by the accused.
7. The financial difficulties experienced by the accused.
8. The accused's (mental condition) (mental impairment) (behavior disorder) (personality disorder).
9. The accused's (physical disorder) (physical impairment) (addiction).
10. The duration of the accused's pretrial confinement or restriction.
11. The accused's GT score of _____.
12. The accused's education which includes: _____.
13. That the accused is a graduate of the following service schools: _____.
14. That the accused's (service records) indicate: _____.
15. That the accused is entitled to wear the following medals and awards: _____.
16. Lack of previous convictions or nonjudicial 15 punishment.
17. Past performance and conduct in the Navy/USMC as reflected by _____.
18. Character evidence—testimony of _____.

19. (Accused's testimony _____.)
20. (The accused's expression of his desire to remain in the service.)
21. (That the accused has indicated that (he/she) does not desire a (BCD) (DD) (Dismissal).)
22. (Testimony of _____, _____, _____.)

(MJ: Further, you should consider:

(Previous convictions) _____.

(Prior Article 15s) _____.

(Prosecution exhibits, stipulations, etc.)

(Rebuttal testimony of _____.

(Nature of the weapon used in the commission of the offense.)

(Nature and extent of injuries suffered by the victim.)

(Period of hospitalization and convalescence required for victim.))

MJ: (ACCUSED NOT TESTIFYING) The court will not draw any adverse inference from the fact that the accused did not elect to testify.

MJ: (ACCUSED NOT TESTIFYING UNDER OATH) The court will not draw any adverse inference from the fact that the accused has elected to make a statement that was not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention of the court, and must be given appropriate consideration. The accused cannot be cross-examined by the prosecution or interrogated by court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

NOTE: SCOPE OF ACCUSED'S UNSWORN STATEMENT. The scope of an accused's unsworn statement is broad. United States v. Grill, 48 MJ 131 (CAAF 1998); United States v. Jeffrey, 48 MJ 229 (CAAF 1998); United States v. Britt, 48 MJ 233 (CAAF 1998). If the accused addresses collateral consequences (the treatment or sentence of others, command options, sex offender registration, or other matters) that would be inadmissible but for their being presented in an unsworn statement, the military judge can use the instruction below to "put the information in proper context by effectively

advising the members to ignore it.” US v. Talkington, 73 MJ 212 (CAAF 2014) (sex offender registration), citing US v. Barrier, 61 MJ 482 (CAAF 2005). In giving the instruction, the military judge must be careful not to suggest that the members should disregard the accused’s unsworn statement.

MJ: The accused’s unsworn statement included the accused’s personal (thoughts) (opinions) (feelings) (statements) about (certain matters) (_____). An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense(s) of which the accused stands convicted. (Under DOD Instructions, when convicted of certain offenses, including the offense(s) here, the accused must register as a sex offender with the appropriate authorities in the jurisdiction in which he resides, works, or goes to school. Such registration is required in all 50 states; though requirements may differ between jurisdictions. Thus, specific requirements are not necessarily predictable.)

It is not your duty (to determine relative blameworthiness of (and whether appropriate disciplinary action has been taken against) others who might have committed an offense, whether involved with this accused or not) (or) (to try to anticipate discretionary actions that may be taken by the accused’s chain of command or other authorities) (or) (to attempt to predict sex offender registration requirements, or the consequences thereof) (_____).

While the accused is permitted to address these matters in an unsworn statement, these possible collateral consequences should not be part of your deliberations in arriving at a sentence. Your duty is to adjudge an appropriate sentence for this accused based upon the offense(s) for which (he) (she) has been found guilty that you regard as fair and just when it is imposed and not one whose fairness depends upon (actions that others (have taken) (or) (may or may not take) (in this case) (or) (in other cases)) (or) (possible requirements of sex offender registration, and the consequences thereof, at certain locations in the future).

MJ: (PLEA OF GUILTY) A plea of guilty is a matter in mitigation that must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government (have been) (usually are) saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.

MJ: (MENDACITY) The evidence presented (and the sentencing argument of trial counsel) raised the question of whether the accused testified falsely before this court under oath. No person, including the accused, has a right to seek to alter or affect the outcome of a court-martial by false testimony. You are instructed that you may consider this issue only within certain constraints.

First, this factor should play no role whatsoever in your determination of an appropriate sentence unless you conclude that the accused did lie under oath to the court.

Second, such lies must have been, in your view, willful and material, meaning important, before they can be considered in your deliberations.

Finally, you may consider this factor insofar as you conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

NOTE: When evidence of rehabilitative potential, defense retention evidence, or government rebuttal to defense retention evidence is introduced, the military judge should consider the following instructions, tailored to the specific evidence. See United States v. Eslinger, 70 MJ 193 (CAAF 2011); United States v. Griggs, 61 MJ 402 (CAAF 2005).

MJ: (IF REHABILITATIVE POTENTIAL EVIDENCE IS PRESENTED) You have heard testimony from (name witness(es)) indicating an opinion regarding the accused's rehabilitative potential. "Rehabilitative potential" refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society. You may consider this evidence in determining an appropriate sentence for the accused.

MJ: (IF DEFENSE RETENTION EVIDENCE IS PRESENTED) You have (also) heard testimony from (name witness(es)) indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (_____). The testimony of a witness indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (_____) is a matter in mitigation that you should consider in determining an appropriate sentence in this case.

MJ: (IF THERE IS REBUTTAL TO DEFENSE RETENTION EVIDENCE) In response to this evidence offered by the defense, you have heard testimony from (name witness(es)) indicating that the witness does not (desire to continue to serve with the accused) (desire to deploy with the accused) (_____). This evidence can only be considered for its tendency, if any, to rebut the defense evidence on this issue.

MJ: (CONCLUDING INSTRUCTIONS FOR ALL REHABILITATIVE POTENTIAL/RETENTION EVIDENCE) You may not consider testimony about (an accused's rehabilitative potential) (and) (whether a witness does (or does not) (desire to continue to serve with the accused) (desire to deploy with the accused) (_____)) as a recommendation regarding the appropriateness of a punitive discharge or any other specific sentence in this case, because no witness may suggest a specific punishment or sentence. (This rule does not apply to (statements) (testimony) by the accused regarding personal requests he/she may make in relation to specific punishments.). Whether the accused should receive a

punitive discharge or any other authorized legal punishment is a matter for you alone to decide in the exercise of your independent discretion based on your consideration of all the evidence.

MJ: (ARGUMENT FOR A SPECIFIC SENTENCE) During argument, trial counsel recommended that you consider a specific sentence in this case. You are advised that the arguments of the trial counsel and (her) (his) recommendations are only (her) (his) individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel. In contrast, you are advised that the defense counsel is speaking on behalf of the accused.

2-6-12. CONCLUDING SENTENCING INSTRUCTIONS

MJ: When you close to deliberate and vote, only the members will be present. I remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make communications to or receive communications from anyone outside the deliberations room, by cell phone, blackberry, or otherwise. Should you need to take a recess or have a question, or when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known. Your deliberations should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of members in the exercise of their judgment.

When you have completed your discussion, then any member who desires to do so may propose a sentence. You do that by writing out on a slip of paper a complete sentence. ((IF MANDATORY MINIMUM SENTENCE) Once again, I advise you that any proposed sentence must include at least (confinement for life with eligibility for parole)(a dismissal)(a dishonorable discharge)(_____). The junior member collects the proposed sentences and submits them to the president, who will arrange them in order of their severity.

You then vote on the proposed sentences by secret written ballot. All must vote; you may not abstain. Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is two-thirds or ___ members. (A sentence that includes (confinement for life without eligibility for parole, or confinement for life, or) confinement in excess of ten years requires the concurrence of three-fourths or ___ members.)

Number of Members	Two-Thirds	Three-fourths	Number of Members	Two-Thirds	Three-Fourths
3	2	N/A	8	6	6
4	3	N/A	9	6	7
5	4	4	10	7	8
6	4	5	11	8	9
7	5	6	12	8	9

The junior member will collect and count the votes. The count is then checked by the president who shall announce the result of the ballot to the members. If you vote on all of the proposed sentences without arriving at the required concurrence, you may then repeat the process of discussion, proposal of sentences, and voting. But once a proposal has been agreed to by the required concurrence, then that is your sentence.

You may reconsider your sentence at any time prior to its being announced in open court. If after you determine your sentence, any member suggests you reconsider the sentence, open the court and the president should announce that reconsideration has been proposed without reference to whether the proposed rebalot concerns increasing or decreasing the sentence. I will give you specific instructions on the procedure for reconsideration.

NOTE: See paragraph 2-7-19, RECONSIDERATION INSTRUCTION (SENTENCE).

MJ: As an aid in putting the sentence in proper form, the court may use the Sentence Worksheet marked Appellate Exhibit ____, which the Bailiff may now hand to the president.

BAILIFF: (Complies.)

MJ: Please use extreme care in completing this worksheet and in selecting the sentence form that properly reflects the sentence of the court. If you have any questions concerning sentencing matters, you should request further instructions in open court in the presence of all parties to the trial. In this connection, you are again reminded that you may not consult the Manual for Courts-Martial or any other publication or writing not properly admitted or received during this trial. These instructions must not be interpreted as indicating an opinion as to the sentence that should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select the sentence that will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. When the court returns, I will examine the Sentence Worksheet. The president will then announce the sentence.

MJ: Do counsel object to the instructions as given or request other instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions?

MBR: (Responds.)

MJ: (President), if you desire a recess during your deliberations, we must first formally reconvene the court and then recess. Knowing this, do you desire to

take a brief recess before you begin deliberations or would you like to begin immediately?

PRES: (Responds.)

MJ: (Trial Counsel) (Bailiff), please give the president Prosecution Exhibit(s) ____ (and Defense Exhibit(s) ____).

TC/BAILIFF: (Complies.)

MJ: (President), please do not mark on any of the exhibits, except the Sentence Worksheet.

TC: (Complies.)

MJ: The court is closed for deliberations.

2-6-13. POST-TRIAL AND APPELLATE RIGHTS ADVICE

MJ: This Article 39(a) session is called to order.

MJ: (Defense Counsel), may I have the appellate rights statement please?

DC: Your honor, the appellate rights statement has been marked as Appellate Exhibit ____, and I hand it now to the military judge.

MJ: (Accused), I have here Appellate Exhibit ____, the appellate rights statement. Is this your signature at end of this document?

ACC: Yes/No, your honor.

MJ: Before you signed this document, did you read it over carefully and discuss all your appellate rights with your counsel?

ACC: Yes/No, your honor.

MJ: Do you understand all of your appellate rights?

ACC: Yes/No, your honor.

MJ: Appellate Exhibit ____ indicates your request concerning service of the record of trial (and the recommendation of the staff judge advocate/legal officer to be delivered to: _____. Appellate Exhibit __ will be attached to the record.

NOTE: If more than one DC, the MJ should determine which counsel will be responsible for post-trial actions and upon whom the staff judge advocate's post-trial recommendation is to be served.

MJ: Is there anything else from either party?

TC/DC: (Response)

MJ: This 39(a) session will now end while we await the sentence.

2-6-14. ANNOUNCEMENT OF SENTENCE

MJ: The court will come to order. All parties present when the court closed are again present, with the exception of the members. Bailiff, please call the members.

MJ: (President), has the court determined a sentence in this case?

PRES: (Responds.)

NOTE: If the president indicates that the members are unable to agree on a sentence, the MJ should give 2-7-18, "HUNG JURY" INSTRUCTION.

MJ: (President), is the sentence reflected on the Sentence Worksheet?

PRES: (Respond.)

MJ: Please (place it in the folder)/(fold it over) and hand it to the Bailiff. Bailiff, please bring me the sentence worksheet.

BAILIFF: (Complies.)

MJ: I have reviewed the Sentence Worksheet and it appears (to be in proper form) (_____). Bailiff, you may return it to the president.

BAILIFF: (Complies.)

MJ: Accused and counsel, please rise. (President), please announce the sentence of the court.

PRES: (Complies.)

MJ: Please be seated.

TC/BAILIFF: (Complies.)

MJ: Members of the court, you have now completed your duties. Please leave all the exhibits behind (with the bailiff). You may take your personal notes with you or leave those behind and they will be destroyed by the court reporter.

MJ: Before I excuse you, let me advise you of one matter. To assist you in determining what you may discuss about this case now that it is over, I remind you of the oath you took as a court member. Essentially, the oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. This prohibition includes such disclosure on social networking or other internet sites. You may, of course, discuss your personal observations of the trial and the process of how a court-martial functions, but not what was discussed during your deliberations.

MJ: Your deliberations are carried on in the secrecy of the deliberation room to permit the utmost freedom of debate and so that each of you can express your views without fear of being subjected to criticism by the accused, the public, the convening authority, or anyone else. In deciding whether to answer questions about this case, and if so, what to disclose, you should have in mind your own interests and the interests of the other members of the court. Does any member have any questions at this time?

MBR: Yes/No, your honor.

MJ: Members of the court, again, I want to thank you for your participation and attentiveness in this case. You may now depart the courtroom and resume your normal duties.

(Members depart the courtroom.)

NOTE: If a pretrial agreement exists, continue below. The MJ must ensure that all parties have the same understanding concerning the operation of the sentence limitation portion on the sentence of the court; otherwise, the plea may be improvident. If no pretrial agreement exists, see next NOTE below.

MJ: (Accused), we are now going to discuss the operation of your pretrial agreement on the sentence of the court. My understanding of the effect of the pretrial agreement on the sentence the court adjudged is as follows: (describe each element of the sentence and the impact, if any, of the pretrial agreement).

MJ: Do counsel agree with the court's interpretation of the sentence limitation portion of the pre-trial agreement?

TC/DC: (Responds.)

MJ: (Accused), is that your understanding?

ACC: (Responds.).

MJ: (Accused), do you have any questions about the effect the sentence limitation portion has on the sentence adjudged by the members?

ACC: (Responds.)

NOTE: In all cases, continue below.

MJ: Are there any other matters to take up before this court adjourns?

TC/DC: (Respond.)

MJ: This court is adjourned.

Section VII
Miscellaneous Procedural Guides

.Procedure and Preliminary	Providence Inquiry	Evidentiary and Rulings
<u>2-7-1. Waiver of Statutory Waiting Period</u>	<u>2-7-4. Pretrial Agreement: Dismissal of Charge Clause</u>	<u>2-7-13. Motion For Finding of Not Guilty</u>
<u>2-7-2. Pro Se Representation</u>	<u>2-7-5. Pretrial Agreement: Testify In Another Case</u>	<u>2-7-24. Stipulations of Fact and Expected Testimony (Not IAW A Pretrial Agreement)</u>
<u>2-7-3. Waiver of Conflict-Free Counsel (DC Representing Multiple Accused)</u>	<u>2-7-6. Pretrial Agreement: Operation of Article 58a On A Suspended Sentence</u>	
<u>2-7-12. Statute of Limitations</u>	<u>2-7-7. Pretrial Agreement: Suspension Without Deferment</u>	
<u>2-7-22. Views and Inspections</u>	<u>2-7-8. Pretrial Agreement: Article 32 Waiver</u>	Argument
<u>2-7-23. Absent Accused Instruction: Preliminary Findings</u>	<u>2-7-9. Pretrial Agreement: Waiver of Members</u>	<u>2-7-20. Comment On Rights To Silence or Counsel</u>
<u>2-7-26. Flow Chart for Challenges and Breaking Quorum</u>	<u>2-7-10. Pretrial Agreement: Waiver of Motions</u>	<u>2-7-27. Argument or Request for a Punitive Discharge</u>
<u>2-7-25. Confessional Stipulation of Fact Inquiry</u>	<u>2-7-11. Pretrial Agreement: Waiver of Motion For Illegal Pretrial Punishment (Article 13) Sentencing Credit</u>	
<u>2-7-29. Special Victim Advocate</u>	<u>2-7-28. Guilty Plea – : Mental Responsibility, Evidence Negating Mens Rea, Competence or Failure to Recall</u>	

Instructions to Members Concerning Findings and Sentence

<u>2-7-14. Reconsideration Instruction (Findings)</u>	<u>2-7-16. Clemency (Recommendation For Suspension)</u>	<u>2-7-21. Credit For Article 15 Punishment</u>
<u>2-7-19. Reconsideration Instruction (Sentence)</u>	<u>2-7-17. Clemency (Additional Instructions)</u>	<u>Table 2-6 Table of Equivalent Punishments</u>
<u>2-7-18. Hung Jury Instruction</u>	<u>2-7-15. Relative Severity of Sentence</u>	<u>Table 2-7 Table of Equivalent Nonjudicial Punishments</u>

2-7-1. WAIVER OF STATUTORY WAITING PERIOD

MJ: (Accused), you have a right to a delay of (three) (five) days between the day charges are served on you and the day of trial, not counting the day of service and the day of trial. Unless you consent, you may not be tried on these charges until _____. Do you understand this right?

ACC: (Responds.)

MJ: Have you discussed this with your defense counsel?

ACC: (Responds.)

MJ: Do you consent to the trial proceeding today?

ACC: (Responds.)

MJ: Has anyone forced you to consent to proceeding today?

ACC: (Responds.)

MJ: Trial Counsel, you may proceed.

2-7-2. PRO SE REPRESENTATION

MJ: (Accused), you have indicated that you wish to represent yourself at this trial. If I permit you to represent yourself, then you will be expected to conduct your defense just as if you were a qualified lawyer. Do you understand that?

ACC: (Responds.)

MJ: Have you ever studied law or had any legal training?

ACC: (Responds.)

MJ: What education do you have? (Do you understand English?)

ACC: (Responds.)

MJ: Do you suffer from any physical or mental ailments?

ACC: (Responds.)

MJ: Are you presently taking any medication?

ACC: (Responds.)

MJ: Have you ever represented yourself or someone else in a criminal trial?

ACC: (Responds.)

MJ: Do you know with what offenses you are charged?

ACC: (Responds.)

MJ: Are you familiar with the MRE?

ACC: (Responds.)

MJ: Do you realize that the MRE govern what evidence may be introduced and those rules must be followed even though you are representing yourself?

ACC: (Responds.)

MJ: Let me give you an example of what could occur at trial. If the trial counsel offers some evidence that normally would not be admissible, a trained lawyer would object to the evidence and the evidence would be kept out of the trial. If you are acting as your own lawyer and you do not recognize that the evidence is inadmissible and fail to object, then the evidence will come in. Do you understand that?

ACC: (Responds.)

MJ: Are you familiar with the Rules for Courts-Martial?

ACC: (Responds.)

MJ: Do you realize the Rules for Courts-Martial govern how this case will be tried?

ACC: (Responds.)

MJ: Do you understand that you would be better off with a trained lawyer who would know the procedures, the rules of evidence, the Rules for Courts-Martial, and the rules of law?

ACC: (Responds.)

MJ: Also, when you represent yourself, you are personally involved in the case and it is very difficult for you to have an objective view of the proceedings. In fact, sometimes, you may become so involved that you harm yourself by what you say and do in court. Whereas, a lawyer whose duty is to represent you can act more objectively, can follow correct procedures, and is less likely to do you harm and is more likely to do you good. Do you understand this?

ACC: (Responds.)

MJ: As a general rule, acting as your own lawyer is not a good policy. Even if you are legally trained, it is not a good idea. If you are not legally trained, it is even worse. Do you understand that?

ACC: (Responds.)

MJ: Do you realize that representing yourself is not a matter of merely telling your story? And if you testify, you cannot just give a statement. You must ask yourself questions and then give answers, according to the MRE and the Rules for Courts-Martial?

ACC: (Responds.)

MJ: Have you discussed the idea of representing yourself with your detailed defense counsel?

ACC: (Responds.)

MJ: Do you realize that the maximum punishment in this case if you are convicted of all charges and specifications is _____?

ACC: (Responds.)

MJ: Have you tried to talk to any other lawyer about your case?

ACC: (Responds.)

MJ: Would you like to talk to another lawyer about this?

ACC: (Responds.)

MJ: Have you understood everything I have said to you?

ACC: (Responds.)

MJ: Let me advise you further that I think it is unwise for you to represent yourself. I strongly urge that you not represent yourself. Knowing all that I have told you, do you still want to act as your own lawyer?

ACC: (Responds.)

NOTE: If accused persists, continue.

MJ: Is this decision made as a result of any threats or force against you? Is it a decision you make of your own free will?

ACC: (Responds.)

MJ: Even though you desire to represent yourself, I recommend that you have counsel sit with you at the counsel table and be available to assist you. Do you want counsel to remain at counsel table?

ACC: (Responds.)

NOTE: RCM 506(d) requires that the MJ be satisfied that the accused is mentally competent to make the decision and understand the disadvantages of self-representation. The MJ should make factual findings regarding the accused's ability to appreciate the nature of a criminal trial; its possible consequences; and the ability of the accused to communicate, to express himself or herself, and whether the decision is a voluntary one. Once the MJ is satisfied that the accused may proceed pro se, the MJ should inform the accused that:

MJ: I am going to have your detailed counsel stay (either at counsel table, if the accused elected, or in the spectator section) throughout your trial and be available. Counsel may provide you with advice and procedural instructions. Counsel will not do anything without your agreement; however, (she) (he) is available to act as your lawyer or assist you at any time. If at any time during the trial, you feel that you could benefit from advice and you want to take a break to talk to counsel about something, let me know, and I will permit it. Do you understand this?

ACC: (Responds.)

REFERENCES: [United States v. Mix](#), 35 MJ 283 (CMA 1992).

2-7-3. WAIVER OF CONFLICT-FREE COUNSEL (DC REPRESENTING MULTIPLE ACCUSED)

MJ: (Accused), do you understand that you have a constitutional right to be represented by counsel who has undivided loyalty to you and your case?

ACC: (Responds.)

MJ: Do you understand that a lawyer ordinarily should not represent more than one client when the representation involves a matter arising out of the same incident?

ACC: (Responds.)

MJ: For a lawyer to represent more than one client concerning a matter arising out of the same incident, you have to consent to that representation. Do you understand that?

ACC: (Responds.)

MJ: Have you discussed this matter with your defense counsel?

ACC: (Responds.)

MJ: After discussing this matter with (her) (him), did you decide for yourself that you would like to have (her) (him) still represent you?

ACC: (Responds.)

MJ: Do you understand that when a defense counsel represents two or more clients regarding a matter arising out of the same incident, then the lawyer may have divided loyalties, that is, for example, the defense counsel may be put in a position of arguing that one client is more at fault than another client?

ACC: (Responds.)

MJ: Understanding that even if an actual conflict of interest does not presently exist between your defense counsel representing you and (her) (his) other client(s), but that one could possibly develop, do you still desire to be represented by _____ ?

ACC: (Responds.)

MJ: Do you understand that you are entitled to be represented by another lawyer where no potential conflict of interest would ever arise?

ACC: (Responds.)

MJ: Knowing this, please tell me why you want to give up your right to conflict-free counsel and be represented by _____ ?

ACC: (Responds.)

MJ: Do you have any questions about your right to conflict-free counsel?

ACC: (Responds.)

MJ: I find that the accused has knowingly and voluntarily waived (his/her) right to conflict-free counsel and may be represented by _____ at this court-martial.

REFERENCES: [United States v. Smith](#), 36 MJ 455 (CMA 1993); [United States v. Hurtt](#), 22 MJ 134 (CMA 1986); [United States v. Breese](#), 11 MJ 17 (CMA 1981).

2-7-4. PRETRIAL AGREEMENT: DISMISSAL OF CHARGE CLAUSE

MJ: Your pretrial agreement indicates that the convening authority has directed the trial counsel to move to dismiss (charge(s) ___ and (its) (their) specification(s) after I accept your plea of guilty. In other words, if I accept your plea of guilty, the government will not prosecute the remaining charge(s) provided your plea of guilty remains in effect until the imposition of sentence, at which time I would grant the motion. Do you understand that?

ACC: (Responds.)

MJ: However, if for some reason your plea of guilty at any time becomes unacceptable, the trial counsel would be free to proceed on (all) (The) (Additional) Charge(s) and (its) (their) specification(s). Do you understand that?

ACC: (Responds.)

2-7-5. PRETRIAL AGREEMENT: TESTIFY IN ANOTHER CASE

MJ: In your pretrial agreement, you have offered to testify truthfully as to the facts and circumstances of this case, as you know them, in the trial of United States v. _____. If you are called as a witness in that case and either refuse to testify or testify untruthfully, the convening authority will no longer be bound by the sentence limitations contained in Appellate Exhibit _____. Do you understand that?

ACC: (Responds.)

***2-7-6. PRETRIAL AGREEMENT: OPERATION OF ARTICLE 58a ON A
SUSPENDED SENTENCE***

MJ: Did you realize at the time you made the agreement, and do you understand now that, under the provisions of Article 58a, UCMJ, if a punitive discharge or confinement in excess of 90 days or three months is adjudged and approved, but suspended by the convening authority as provided in your agreement, you will automatically be reduced to the lowest enlisted pay grade, E-1?

2-7-7. PRETRIAL AGREEMENT: SUSPENSION WITHOUT DEFERMENT

MJ: Your pretrial agreement provides that the convening authority will suspend for ___ (years) (months) any sentence to confinement which is adjudged. However, the agreement makes no reference to deferment. Did you realize at the time you made the agreement, and do you understand now that the effect of this provision is that you will begin serving any sentence to confinement when adjudged and the convening authority will suspend the (unexecuted) (unserved) portion of any confinement when (she) (he) takes action in your case and you will then be released from confinement?

2-7-8. PRETRIAL AGREEMENT: ARTICLE 32 WAIVER

MJ: Your pretrial agreement states that you agreed to waive the Article 32 investigation. Have you discussed what an Article 32 investigation is with your defense counsel?

ACC: (Responds.)

MJ: Do you understand that no charge against you may be tried at a general court-martial without first having an Article 32 investigation concerning that charge unless you agree otherwise?

ACC: (Responds.)

MJ: Do you understand that the primary purpose of the Article 32 investigation is to have a fair and impartial hearing officer inquire into the truth of the matters set forth in the charge(s) and to obtain information on which to recommend what disposition should be made of the case?

ACC: (Responds.)

MJ: Do you also understand that you have the right to be present at the Article 32 investigation and to be represented by counsel at the investigation?

ACC: (Responds.)

MJ: Do you understand that you could call witnesses, cross-examine government witnesses, and present documents for the investigating officer to consider in arriving at his or her recommendations?

ACC: (Responds.)

MJ: Do you understand that you could have provided sworn or unsworn testimony at the Article 32 investigation?

ACC: (Responds.)

MJ: Do you also understand that one possible strategy for you and your counsel at the Article 32 investigation could have been an attempt to have the Article 32 officer recommend a disposition of the charge(s) other than trial by general court-martial?

ACC: (Responds.)

MJ: Did you know about all these rights that you would have at the Article 32 investigation at the time you elected to give up the right to have the Article 32 investigation?

ACC: (Responds.)

MJ: Do you freely and willingly agree to proceed to trial by general court-martial without an Article 32 investigation occurring in your case?

ACC: (Responds.)

MJ: Defense Counsel, if the accused's plea of guilty is determined to be improvident will the accused be afforded an Article 32 investigation or is it permanently waived?

DC: (Responds.)

MJ: Trial Counsel, do you agree?

TC: (Responds.)

2-7-9. PRETRIAL AGREEMENT: WAIVER OF MEMBERS

MJ: Your pretrial agreement states that you agree to waive, that is give up, trial by members and to select trial by military judge alone.

ACC: (Responds.)

MJ: Do you understand the difference between trial before members and trial before military judge alone, as I explained to you earlier?

ACC: (Responds.)

MJ: Did you understand the difference between the various types of trials when you signed your pretrial agreement?

ACC: (Responds.)

MJ: Did you understand that you were giving up trial with members when you signed your pretrial agreement?

ACC: (Responds.)

MJ: Was that waiver a free and voluntary act on your part?

ACC: (Responds.)

2-7-10. PRETRIAL AGREEMENT: WAIVER OF MOTIONS

NOTE 1: Waiver of motions in a pretrial agreement. RCM 705 prohibits any term in a pretrial agreement that is not voluntary or deprives the accused of the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the complete and effective exercise of post-trial and appellate rights. Thus, a term to “waive all motions” is overbroad and cannot be enforced. However, if the pretrial agreement includes a term to waive a particular motion not precluded by RCM 705 or a term to “waive all waiveable motions” or words to that effect, proceed along the lines of the instruction below. See paragraph 2-7-11, WAIVER OF MOTION FOR ILLEGAL PRETRIAL PUNISHMENT (ARTICLE 13) SENTENCING CREDIT.

MJ: Defense Counsel, what motions are you not making pursuant to this provision of the pretrial agreement?

DC: (Responds.)

MJ: (To accused) Your pretrial agreement states that you waive, or give up, the right to make a motion regarding (state the specific motion(s) waived by the pretrial agreement). I advise you that certain motions are waived, or given up, if your defense counsel does not make the motion prior to entering your plea. Some motions, however, such as motions to dismiss for a lack of jurisdiction or failure to state an offense, for example, can never be given up. Do you understand that this term of your pretrial agreement means that you give up the right to make (this) (any) motion which by law is given up when you plead guilty?

ACC: (Responds.)

MJ: In particular, do you understand that this term of your pretrial agreement precludes this court or any appellate court from having the opportunity to determine if you are entitled to any relief based upon (this) (these) motion(s)?

ACC: (Responds.)

MJ: When you elected to give up the right to litigate (this) (these) motion(s), did your defense counsel explain this term of your pretrial agreement and the consequences to you?

ACC: (Responds.)

MJ: Did anyone force you to enter into this term of your pretrial agreement?

ACC: (Responds.)

MJ: Defense Counsel, which side originated the waiver of motion(s) provision?

DC: (Responds.)

NOTE 2: Unlawful Command Influence. The government may not require waiver of an unlawful command influence motion to obtain a pretrial agreement. The accused, however, may offer to waive an unlawful command influence motion if the unlawful command influence involves issues occurring only during the accusatory phase of the court-martial (i.e., during preferral, forwarding, and referral of charges), as opposed to the adjudicative process (i.e., which includes interference with witnesses, judges, members, and counsel). See United States v. Weasler, 43 MJ 15 (CAAF 1995). If a waiver of an unlawful command influence motion originated with the prosecution, the judge should declare the term void as a matter of public policy. For other motions not falling within the prohibited terms of RCM 705, regardless of their origination, and for unlawful command influence motions originated by the defense which involve issues only during the accusatory phase, continue as set forth below:

MJ: (to accused) (Although the government originated this term of your pretrial agreement,) Did you freely and voluntarily agree to this term of your pretrial agreement in order to receive what you believed to be a beneficial pretrial agreement?

ACC: (Responds.)

MJ: Defense Counsel, what do you believe to be the factual basis of any motions covered by this term of the pretrial agreement?

DC: (Responds.)

MJ: (To the accused) Do you understand that if (this) (these) motion(s) were made and granted by me, then a possible ruling could have been that (all charges against you would be dismissed) (the statement you gave to (your command) (law

enforcement authorities) (_____) could not be used as evidence against you at this court-martial) (_____)?

ACC: (Responds.)

MJ: (To the accused) Knowing what your defense counsel and I have told you, do you want to give up making (this) (these) motion(s) in order to get the benefit of your pretrial agreement?

ACC: (Responds.)

MJ: Do you have any questions about this provision of your pretrial agreement?

ACC: (Responds.)

2-7-11. PRETRIAL AGREEMENT: WAIVER OF MOTION FOR ILLEGAL PRETRIAL PUNISHMENT (ARTICLE 13) SENTENCING CREDIT

MJ: Your pretrial agreement indicates that you agree to waive, or give up, your right to make a motion about whether you have suffered from illegal pretrial punishment. Article 13 of the Uniform Code of Military Justice essentially prohibits anyone from imposing pretrial punishment upon you except for the minimum amount of restraint necessary to ensure your presence for trial. In addition, your chain of command may not publicly humiliate or degrade you as a form of punishment. Do you understand what I have said?

ACC: (Responds.)

MJ: What was the nature of the pretrial restraint, if any, that you have undergone pending this trial?

ACC: (Responds.)

MJ: (If accused had been in pretrial restraint:) What is it about this pretrial restraint that you believe may have been illegal?

ACC: (Responds.)

MJ: Tell me about other illegal pretrial punishment, if any, you may have suffered.

ACC: (Responds.)

MJ: (If accused has been in pretrial confinement:) Do you understand that the law requires that I award you day for day credit against the sentence for any lawfully imposed pretrial confinement imposed in this case?

ACC: (Responds.)

MJ: Do you also understand that if you convinced me that more likely than not you suffered from illegal pretrial punishment, then you would be entitled to (additional) credit against any sentence which you may receive in this case?

ACC: (Responds.)

MJ: Do you understand that, by this term of your pretrial agreement, you are giving up the right for this court, or any court considering an appeal of your case, to determine if you actually suffered from illegal pretrial punishment to include a claim for (additional) credit against your sentence for illegal pretrial punishment?

ACC: (Responds.)

MJ: Defense Counsel, have you considered the amount of credit you would have asked for if this issue were to be litigated?

DC: (Responds.)

MJ: (To the accused) Do you understand that the amount of credit for illegal pretrial punishment, if any, would be subject to my discretion depending on the seriousness of the illegal pretrial punishment? (If you succeeded on this issue, do you understand that you may have received the credit sought by your defense counsel, or possibly more or less than that amount?)

ACC: (Responds.)

MJ: Do you understand that by not litigating this issue, you will never know what credit for illegal pretrial punishment, if any, that you would be entitled to, and that you will receive no credit against your sentence for illegal pretrial punishment?

ACC: (Responds.)

MJ: When you elected to give up the right to litigate the illegal pretrial punishment issue, did your defense counsel explain this issue and the consequences to you?

ACC: (Responds.)

MJ: Did anyone force you to enter into this term of your pretrial agreement?

ACC: (Responds.)

MJ: Defense Counsel, which side originated this term of the pretrial agreement?

DC: (Responds.)

MJ: (Although the government originated this term of your pretrial agreement,) Did you freely and voluntarily decide to agree to this term of your pretrial agreement in order to receive what you believed to be a beneficial pretrial agreement?

ACC: (Responds.)

MJ: Knowing what I have now told you, do you still desire to give up the right to litigate the issue of illegal pretrial punishment as long as your pretrial agreement continues to exist?

ACC: (Responds.)

MJ: Do you have any questions about this provision of your pretrial agreement?

ACC: (Responds.)

MJ: As I have stated, if I accept your waiver of the Article 13 issue, I will not order any credit to be applied against your sentence for illegal pretrial punishment. You may, however, bring to the court's attention (the conditions of your pretrial restraint) (and) (your perceived pretrial punishment) in the sentencing phase of the trial so that the court can consider such matters in deciding upon an appropriate sentence for you. Do you understand that?

ACC: (Responds.)

REFERENCES: [United States v. McFadyen, 51 MJ 289 \(CAAF 1999\)](#).

2-7-12. STATUTE OF LIMITATIONS

NOTE: Unless it affirmatively appears in the record that the accused is aware of his/her right to plead the statute of limitations when it is obviously applicable, the MJ has a duty to advise the accused of the right to assert the statute in bar of trial. This advice should be given before the accused is allowed to enter a plea except in the unusual case where the applicability of the statute first becomes known after evidence is presented or after findings. The advice may be substantially as follows:

MJ: _____, one of the offenses for which you are about to be tried is (specify the offense). This offense is alleged to have been committed more than (five) (___) years before the date upon which the sworn charges in this case were received by a summary court-martial convening authority. It therefore appears that the statute of limitations may properly be asserted by you in bar of trial for this offense. In other words, this specification (and charge) must be dismissed upon your request. Take time to consult with your counsel and then advise me whether you wish to assert the statute of limitations in bar of trial for the offense of (specify the offense).

NOTE: An election by the accused to assert the statute should be treated as a motion to dismiss. Where the motion to dismiss because of the statute of limitations raises a question of fact, the MJ should defer ruling until all evidence has been presented. When determination of such issue is essential to the question of guilt or innocence of an alleged offense, the issue of fact must be decided by the court pursuant to appropriate instructions. RCM 905 and 907.

2-7-13. MOTION FOR FINDING OF NOT GUILTY

NOTE: The DC may make any motion for a finding of not guilty when the government rests or after the defense has rested, or both. Such a motion should be made at an Article 39(a) session outside the presence of the members. Before the motion is ruled upon, the DC may properly be required to indicate specifically wherein the evidence is legally insufficient. Also, the ruling on the motion may be deferred to permit the TC to reopen the case for the prosecution and produce any available evidence. The MJ rules finally on the motion for findings of not guilty. If there is any evidence which, together with all inferences that can properly be drawn therefrom and all applicable presumptions, could reasonably tend to establish every essential element of an offense charged, the motion will not be granted. If, using the same test, there is insufficient evidence to support the offense charged, but there is sufficient evidence to support a lesser included offense, the military judge may grant the motion as to the greater part and, if appropriate, the corresponding charge. See RCM 917. Normally, the motion should not be made before the court members. If the motion is mistakenly made before the members and is denied, the MJ should instruct the members as follows:

MJ: You are advised that my ruling(s) on the defense motion for a finding of not guilty must not influence you in any way when you consider whether the accused is guilty or not guilty. The ruling(s) (was) (were) governed by a different standard than that which will guide you in determining whether the accused is guilty or not guilty. A finding of guilty may not be reached unless the government has met its burden of establishing the guilt of the accused beyond a reasonable doubt, and whether this standard of proof has been met is a question which must be determined by you without any references to my prior ruling(s) on the motion(s) for a finding of not guilty.

NOTE: If the motion is granted in part, so that the specification is reduced to a lesser offense, the MJ should instruct the members as follows:

MJ: You are advised that I have found the accused not guilty of the part of (The) Specification (____) of (The) (Additional) Charge _____ which alleges the offense of _____. However, the accused remains charged in this specification with the lesser offense of _____. My ruling must not influence you in any way when you consider whether the accused is guilty or not guilty of the lesser offense. The ruling was governed by a different standard than that which will

guide you in determining whether the accused is guilty or not guilty of the lesser offense. A finding of guilty may not be reached unless the government has met its burden of establishing the guilt of the accused beyond a reasonable doubt, and whether this standard of proof has been met is a question which must be determined by you without reference to my prior ruling on the motion for a finding of not guilty.

NOTE: Depending upon the complexity of the changes resulting from a partial finding of not guilty, the MJ should direct the members to amend their copies of the flyer or direct preparation of a new flyer.

2-7-14. RECONSIDERATION INSTRUCTION (FINDINGS)

NOTE: An instruction substantially as follows must be given when any court member proposes reconsideration:

MJ: Reconsideration is a process wherein you are allowed to re-vote on your finding(s) after you have reached a finding of either guilty or not guilty. The process for reconsideration is different depending on whether the proposal to reconsider relates to a finding of guilty or a finding of not guilty. After reaching your finding(s) by the required concurrence, any member may propose that (some or all of) the finding(s) be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote on the finding(s). In order for you to reconsider and re-vote on a finding, the following rules apply:

**Table 2-4
Votes Needed Reconsideration of Findings**

No. of Members	Not Guilty	Guilty
3	2	2
4	3	2
5	3	2
6	4	3
7	4	3
8	5	3
9	5	4
10	6	4
11	6	4
12	7	5

MJ: If the proposal is to reconsider a not guilty finding, then a majority of the members must vote by secret, written ballot in favor of reconsideration. Since we have ___ members, that means ___ members must vote in favor of reconsidering any finding of not guilty. If the proposal is to reconsider a guilty finding, then more than one-third of the members must vote by secret, written ballot in favor of reconsideration. Since we have ___ members, that means ___ members must

vote in favor of reconsidering any finding of guilty. (If the proposal is to reconsider a guilty finding where the death penalty is mandatory for that finding, which means in this case, a guilty finding for the offense(s) of _____, then a proposal by any member for reconsideration regarding (that) (those) offense(s) requires you to reconsider that finding.) If you do not receive the required concurrence in favor of reconsideration, that ends the issue and you should open the court to announce the findings as originally voted. If you do receive the required concurrence in favor of reconsideration, then you must adhere to all my original instructions for determining whether the accused is guilty or not guilty, to include the procedural rules pertaining to your voting on the findings and (the required two-thirds concurrence for a finding of guilty) (the unanimous vote requirement for a finding of guilty for a capital offense). (COL) (_____), when the findings are announced, do not indicate whether they are the original findings or the result of reconsideration.

2-7-15. RELATIVE SEVERITY OF SENTENCE

NOTE: The following matters commonly arise pertaining to sentence or during the members' deliberation on sentence. They should be given when counsel or a member of the court raises a question or makes a request calling for such instructions or when the need for such instructions is otherwise apparent. Before answering any question concerning relative severity of sentences, the views of counsel for both sides and the accused should be ascertained. An Article 39(a) session may be required. The following instruction, as modified to meet the circumstances of the particular case, may be given:

MJ: The question as to whether a sentence of _____ is less severe than a sentence of _____ is a question that cannot be resolved with mathematical certainty. However, I remind you of my advice as to the effect of punitive discharges. Either type of punitive discharge and its consequences remain with the accused for the rest of (his) (her) life, whereas the (period of confinement once served) (or) (money once forfeited) does not have the same permanent stigma. In light of these instructions and the facts and circumstances of this case, you should determine which of the proposed sentences is the least severe and vote on it first. In determining the order of severity, any differences among you must be decided by majority vote. After deciding which of the proposed sentences should be voted on first, you should proceed to deliberate and vote on an appropriate sentence in this case.

2-7-16. CLEMENCY (RECOMMENDATION FOR SUSPENSION)

MJ: You have no authority to suspend either a part of or the entire sentence that you adjudge; however, you may recommend such suspension. Such a recommendation is not binding on the convening or higher authority. Thus, in arriving at a sentence, you must be satisfied that it is appropriate for the offense(s) of which the accused has been convicted, even if the convening or higher authority refuses to adopt your recommendation for suspension.

If fewer than all members wish to recommend suspension of a part of, or the entire sentence, then the names of those making such a recommendation, or not joining in such a recommendation, whichever is less, should be listed at the bottom of the Sentence Worksheet.

Where such a recommendation is made, then the president, after announcing the sentence, may announce the recommendation, and the number of members joining in that recommendation. Whether to make any recommendation for suspension of a part of or the entire sentence is solely in the discretion of the court.

Your responsibility is to adjudge a sentence that you regard as fair and just at the time it is imposed, and not a sentence that will become fair and just only if your recommendation is adopted by the convening or higher authority.

2-7-17. CLEMENCY (ADDITIONAL INSTRUCTIONS)

MJ: It is your independent responsibility to adjudge an appropriate sentence for the offense(s) of which the accused has been convicted. However, if any or all of you wish to recommend clemency, it is within your authority to do so after the sentence is announced. Your responsibility is to adjudge a sentence that you regard as fair and just at the time it is imposed and not a sentence that will become fair and just only if the mitigating action recommended in your clemency recommendation is adopted by the convening or higher authority who is in no way obligated to accept your recommendation.

A recommendation by the court for an administrative discharge or disapproval of a punitive discharge, if based upon the same matters as the sentence, is inconsistent with a sentence to a punitive discharge as a matter of law. You may make the court's recommendation expressly dependent upon such mitigating factors as (the (attitude) (conduct) of) (or) (the restitution by) the accused after the trial and before the convening authority's action.

2-7-18. "HUNG JURY" INSTRUCTION

NOTE: Whenever any question arises concerning whether the required concurrence of members on a sentence or other matter relating to sentence is mandatory, or the MJ, after discussion with counsel for both sides and the accused, determines the jury has been deliberating for an inordinate length of time, the court may be advised substantially as follows:

MJ: As the sentence in this case is discretionary with you members, you each have the right to conscientiously disagree. It is not mandatory that the required fraction of members agree on a sentence and therefore you must not sacrifice conscientious opinions for the sake of agreeing upon a sentence. Accordingly, opinions may properly be changed by full and free discussion during your deliberations. You should pay proper respect to each other's opinions, and with an open mind you should conscientiously compare your views with the views of others.

Discussion may follow as well as precede the voting. All members must have a full and fair opportunity to exchange their points of view and to persuade others to join them in their beliefs. It is generally desirable to have the theories for both the prosecution and the defense weighed and debated thoroughly before final judgment. You must not go into the deliberation room with a fixed determination that the sentence shall represent your opinion of the case at the moment, nor should you close your ears to the arguments of the other members who have heard the same evidence, with the same attention, with an equal desire for truth and justice, and under the sanction of the same oath. But you are not to yield your judgment simply because you may be outnumbered or outweighed.

If, after comparing views and repeated voting for a reasonable period in accordance with these instructions, your differences are found to be irreconcilable, you should open the court and the president may then announce, in lieu of a formal sentence, that the required fraction of members are unable to agree upon a sentence.

NOTE: In capital cases, only one vote on the death penalty may be taken.

NOTE: If the President subsequently announces that the court is unable to agree upon a sentence, a mistrial as to sentence should be declared. The court should then be adjourned.

2-7-19. RECONSIDERATION INSTRUCTION (SENTENCE)

MJ: Reconsideration is a process wherein you are allowed to re-vote on a sentence after you have reached a sentence. The process for reconsideration is different depending on whether the proposal to reconsider relates to increasing or decreasing the sentence. After reaching a sentence by the required concurrence, any member may propose that the sentence be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote on the sentence. In order for you to reconsider and re-vote on the sentence, the following rules apply:

**Table 2-5
Votes Needed for Reconsideration of Sentence**

No. of Members	Increase Sentence	Decrease Sentence (10 yrs or less)	Decrease Sentence (Conf > 10 years)
3	2	2	
4	3	2	
5	3	2	2
6	4	3	2
7	4	3	2
8	5	3	3
9	5	4	3
10	6	4	3
11	6	4	3
12	7	5	4

If the proposal to reconsider is with a view to increasing the sentence, then a majority of the members must vote by secret, written ballot in favor of reconsideration. Since we have _____ members, that means at least _____ members must vote in favor of reconsideration with a view to increase the sentence. If the proposal to reconsider is with a view to decrease the sentence, then more than one-third of the members must vote by secret, written ballot in favor of reconsideration. Since we have ___ members, then ___ members must vote in favor of reconsideration with a view to decrease the sentence. (However,

if the sentence you have reached includes confinement in excess of ten years (or confinement for life) (or confinement for life without eligibility for parole), then only more than one-fourth of the members, or at least _____ members, must vote in favor of reconsideration with a view to decrease the sentence.) (If the sentence you have reached is death, then a proposal by any member for reconsideration requires you to reconsider.) If you do not receive the required concurrence in favor of reconsideration, that ends the issue and you should open the court to announce the sentence as originally voted. If you do receive the required concurrence in favor of reconsideration, then you must adhere to all my original instructions for proposing and determining an appropriate sentence to include the two-thirds (or three-fourths) (or unanimous) concurrence required for a sentence. (COL) (_____), when the sentence is announced, do not indicate whether it is the original sentence or the result of reconsideration.

2-7-20. COMMENT ON RIGHTS TO SILENCE OR COUNSEL

NOTE: Comment on or question about an accused's exercise of a right to remain silent, to counsel, or both. Except in extraordinary cases, a question concerning, evidence of, or argument about, an accused's right to remain silent or to counsel is improper and inadmissible. If such information is presented before the fact finder, even absent objection, the military judge should: determine whether or not this evidence is admissible and, if inadmissible, evaluate any potential prejudice, make any appropriate findings, and fashion an appropriate remedy. In trials with members, this should be done in an Article 39(a) session. Cautions to counsel and witnesses are usually appropriate. If the matter was improperly raised before members, the military judge must ordinarily give a curative instruction like the following, unless the defense affirmatively requests one not be given to avoid highlighting the matter. Other remedies, including mistrial, might be necessary. See United States v. Garrett, 24 MJ 413 (CMA 1987), and United States v. Sidwell, 51 MJ 262 (CAAF 1999).

MJ: (You heard) (A question by counsel may have implied) that the accused may have exercised (his) (her) (right to remain silent) (and) (or) (right to request counsel). It is improper for this particular (question) (testimony) (statement) to have been brought before you. Under our military justice system, military personnel have certain constitutional and legal rights that must be honored. When suspected or accused of a criminal offense, a service member has (an absolute right to remain silent) (and) (or) (certain rights to counsel). That the accused may have exercised (his) (her) right(s) in this case must not be held against (him) (her) in any way. You must not draw any inference adverse to the accused because (he) (she) may have exercised such right(s), and the exercise of such right(s) must not enter into your deliberations in any way. You must disregard the (question) (testimony) (statement) that the accused may have invoked his right(s). Will each of you follow this instruction?

2-7-21. CREDIT FOR ARTICLE 15 PUNISHMENT

NOTE 1: Using this instruction. When an accused has previously received nonjudicial punishment for the same offense of which the accused stands convicted at the court-martial, the defense has the option to introduce evidence of the prior nonjudicial punishment for the sentencing authority to consider. If the defense introduces the Article 15 in mitigation in a trial with members, the judge must instruct as to the specific credit (see NOTE 2) that will be given for the prior nonjudicial punishment unless the defense requests that the judge merely instruct that the members consider the prior punishment (see NOTE 3) when adjudging the sentence. The judge should obtain the defense's election regarding the desired instruction at the Article 39(a) session on sentencing instructions. The defense also has the right to have the judge determine the proper credit to be given by the convening authority without making the members aware of the prior Article 15 or the specific credit to be given (see NOTE 4). In a judge alone trial, the judge must state on the record the specific credit to be awarded for the prior punishment. See United States v. Gammons, 51 MJ 169 (CAAF 1999).

NOTE 2: Instruction on specific credit. When the judge instructs on specific credit to be given for a prior Article 15 punishment, the judge must ensure the accused receives "day-for-day, dollar-for-dollar, stripe-for-stripe" credit for any prior nonjudicial punishment suffered for the same offense(s) on which the accused was convicted at the court-martial. United States v. Pierce, 27 MJ 367 (CMA 1989). The judge should address this issue when discussing proposed sentencing instructions with counsel to arrive at a fair and reasonable credit on which to instruct. Because the types of punishment administered nonjudicially and judicially are not always identical, and because no current guidelines exist for equivalent punishments except those contained in RCM 1003(b) (6) and (7), which provide an equivalency for restriction and hard labor without confinement{ XE "Hard labor, with or without confinement, effect of" } to that of confinement, the judge is responsible to ensure that the accused receives proper credit for the prior punishment. (Judges may want to look to the 1969 MCM's Table of Equivalent Punishments as a guide. That Table indicated that one day of confinement equals one and one-half days of hard labor without confinement, or two days' restriction, or one day's forfeiture of pay.) Once the judge determines the appropriate credit (see, e.g., United States v. Edwards, 42 MJ 381 (CAAF 1995)), the judge should give an instruction substantially as follows:

When you decide upon a sentence in this case, you must consider that punishment has already been imposed upon the accused under Article 15, UCMJ, for the offense(s) of _____ of which (he) (she) has also been convicted at this court-martial. The accused will receive specific credit for the prior

nonjudicial punishment which was imposed and approved. After trial and when the case is presented to the convening authority for action, the convening authority must credit the accused with the prior punishment from the Article 15 proceeding against any sentence you may adjudge. The convening authority, therefore, must [state the specific credit to be given by stating words to the effect of: (disapprove any adjudged reprimand) (and) (reduce any adjudged forfeiture of pay by \$ _____ pay per month for _____ month(s)) (and) (credit the accused with already being reduced in grade to E- _____) (and) (reduce any adjudged restriction by _____ days, or reduce any adjudged hard labor without confinement by _____ days, or reduce any adjudged confinement by _____ days)].

NOTE 3: General consideration of prior Article 15. When the defense desires that the judge only instruct that consideration, without stating any specific credit, be given to the prior Article 15 punishment, then the judge should instruct as follows (with the caveat that, if the defense counsel requests it, the judge must determine and announce the specific credit to be awarded outside the presence of the court members; see NOTE 4.):

When you decide upon a sentence in this case, you must consider that punishment has already been imposed upon the accused under Article 15, UCMJ, for the offense(s) of _____ of which (he) (she) has also been convicted at this court-martial. This prior punishment is a matter in mitigation which you must consider.

NOTE 4. When evidence of the Article 15 or the amount of specific credit for the Article 15 is not presented to the court members. The defense not only has the election not to make the court members aware of the specific credit to be given for the prior Article 15 for the same offense of which the accused stands convicted (see NOTE 3), but also can elect not to bring any evidence of the prior Article 15 to the attention of the members. In either situation, however, the defense has a right, at an Article 39(a) session, to have the judge determine the credit which the convening authority must give to the accused. In this situation, it is suggested that the judge defer determining the actual credit for the convening authority to give until after the sentence has been announced. This procedure will ensure that the judge awards the proper equivalent credit. The judge may adapt the instruction following NOTE 2 to announce what credit the convening authority must apply. The defense also has the option to not raise the credit issue at trial, and can raise it for the first time before the convening authority after trial.

REFERENCES: [United States v. Gammons, 51 MJ 169 \(CAAF 1999\)](#); [United States v. Pierce, 27 MJ 367 \(CMA 1989\)](#).

**Table 2-6
Table of Equivalent Punishments**

Confinement at hard labor	Hard labor without confinement	Restriction to limits	Forfeiture
1 day	1 1/2 days	2 days	1 day's pay

**Table 2-7
Table of Equivalent Nonjudicial Punishments**

Kind of Punishment	Upon commissioned and warrant officers (to be used only by an officer with GCM jurisdiction, or by a flag officer in command or his delegate)	Upon other personnel
Arrest in Quarters	1 day	-----
Restriction	2 days	2 days
Extra Duties	-----	1 1/2 days*
Correctional Custody	-----	1 day
Forfeiture of pay	1 day's pay	1 day's pay

*The factor designated by asterisk in the table above is 2 instead of 1 1/2 when the punishment is imposed by a commanding officer below the grade of major or lieutenant commander. The punishment of forfeiture of pay may not be substituted for the other punishments listed in the table, nor may those other punishments be substituted for forfeiture of pay.

2-7-22. VIEWS AND INSPECTIONS

NOTE 1: Guidance on views and inspections. The military judge may, as a matter of discretion, permit the court-martial to view or inspect premises or a place or an article or object. A view or inspection should be permitted only in extraordinary circumstances (See NOTE 2). A view or inspection shall take place only in the presence of all parties, the members (if any), the military judge, and the reporter. A person familiar with the scene may be designated by the military judge to escort the court-martial. Such person shall perform the duties of escort under oath. The escort shall not testify, but may point out particular features prescribed by the military judge. Any statement made at the view or inspection by the escort, a party, the military judge, or any member shall be made a part of the record. The fact that a view or inspection has been made does not necessarily preclude the introduction in evidence of photographs, diagrams, maps, or sketches of the place or item viewed, if these are otherwise admissible. Before conducting the session described below in the presence of the members, the military judge should hold an Article 39(a) session to determine exactly what place or items will be viewed or inspected and that the below procedures and instructions are properly tailored to the circumstances.

NOTE 2: Considerations whether to permit a view.

a. The party requesting a view or inspection has the burden of proof both as to relevance and extraordinary circumstances. The military judge must be satisfied that a view or inspection is relevant to guilt or innocence as opposed to a collateral issue. The relevance must be more than minimal and, even when relevance is established, the proponent must still establish extraordinary circumstances.

b. Extraordinary circumstances exist only when the military judge determines that other alternative evidence (testimony, sketches, diagrams, maps, photographs, videos, etc.) is inadequate to sufficiently describe the premises, place, article, or object. The military judge should also consider the orderliness of the trial, how time consuming a view or inspection would be, the logistics involved, safety concerns, and whether a view or inspection would mislead or confuse members.

c. A view is not intended as evidence, but simply to aid the trier of fact in understanding the evidence.

d. Counsel and the military judge should be attentive to alterations to, or differences in, the item or location to be viewed or inspected as compared to the time that the place or item is relevant to the proceedings. Differences in time of day, time of the year, lighting, and other factors should also be discussed. The military judge should be prepared, with assistance of counsel, to note these differences to the members.

MJ: The court will be permitted to view (the place in which the offense charged in this case is alleged to have been committed) (_____) as requested by (trial) (defense) counsel. Does the (trial) (defense) counsel desire that an escort accompany the court?

(TC) (DC): Yes, I suggest that _____ serve as the escort. (He has testified as to the (place) (_____) and I believe that it is desirable to have him as escort.)

MJ: Does (trial) (defense) counsel have any objection to _____ as escort?

(TC) (DC): (No objection) (_____).

MJ: Have _____ come into the courtroom. (The proposed escort enters the courtroom.)

TC: (To escort) State your full name, (grade, organization, station, and armed force) (occupation and city and state of residence).

Escort: _____.

MJ: The court has been authorized to inspect (the place in which the offense charged in this case is alleged to have been committed) (_____) and desires you to act in the capacity of escort. Do you have any objections to serving as escort?

Escort: No, your Honor.

MJ: Trial Counsel will administer the oath to the escort.

TC: Please raise your right hand. Do you (swear) (or) (affirm) that you will escort the court and will well and truly point out to them (the place in which the offense charged in this case is alleged to have been committed) (_____); and that you will not speak to the court concerning (the alleged offense) (_____), except to describe (the place aforesaid) (_____). So help you God.

Escort: I do.

MJ: This view is being undertaken to assist the court in understanding and applying the evidence admitted in the trial. The view itself is not evidence; it

merely enables the court to consider and apply the evidence before it in the light of the knowledge obtained by the inspection. Likewise, nothing said at the inspection is to be considered as evidence. The court will not hear witnesses or take evidence at the view. Counsel and members of the court properly may ask the escort to point out certain features, but they must otherwise refrain from conversation. Counsel, the members, and I will be provided with paper and a writing instrument to write out any questions of the escort and the questions will be marked as an appellate exhibit. The reporter is instructed to record all statements made at the view by counsel, the accused, the escort, the members, or me. Reenactments of the events involved or alleged to have been committed are not authorized. The escort, counsel, the accused, the reporter, and I will be present with the court at all times during the view. The court will now recess and remain in the vicinity of the courtroom to await necessary transportation. When the view has been completed, the court will reassemble and the regular proceedings will be resumed.

MJ: Are there any questions from the members about the procedure we are to follow?

MBRS: (Respond.)

MJ: (Other than at the previous Article 39(a) session held earlier on this matter,) Do counsel have any objections to these instructions or any requests about how the viewing is to be conducted?

TC/DC: (Respond.)

NOTE 3: The court should then proceed to the place to be inspected. After the court has assembled at the place to be viewed, the military judge should state in substance as follows:

MJ: It is now ___ hours on the ___ day of _____ 20___; all parties to the trial who were present when the court recessed are present; and that _____ is also present.

NOTE 4: The military judge should then ask questions of the escort to identify the physical location of the court.

MJ: The members of the court are at liberty to look around. If you have questions to ask of the escort, please write them out so that I can ask them in the presence of all the parties to the trial. Remain together. Please bear in mind that everything said during the course of the view must be recorded by the court reporter. The members may not talk or otherwise communicate among themselves.

NOTE 5: The court should then be allowed sufficient time to inspect the place or item in question.

MJ: Does any member or counsel have any questions to ask the escort? (If so, please write them out on the forms provided.) If not, I we are in recess until _____.

NOTE 6: Once the view is conducted, the military judge should conduct an Article 39(a) session substantially as follows:

MJ: Does any party have any objections to how the view was conducted or to anything that occurred during the view?

TC/DC: (Respond.)

NOTE 7: After the court is called to order and all parties to the trial are accounted for, the military judge should make the following announcement:

MJ: During the recess, the members of the court, counsel, the accused, the escort, the military judge, and the reporter viewed (the place in which the offense charged in this case is alleged to have been committed) (which was identified by the escort as _____) (_____). The transcript of the reporter's Notes taken at the view will be inserted at the proper chronological point in the record of trial. The members are instructed to avoid, and not go to, the location we just visited until the trial has ended.

REFERENCES:

(1) Views and inspections generally. RCM 913(c)(3).

(2) Oath for escort. RCM 807(b).

(3) Test for whether a view is warranted. United States v. Marvin, 24 MJ 365 (CMA 1987); United States v. Ayala, 22 MJ 777 (ACMR 1986), *aff'd* 26 MJ 190 (CAAF 1988); and United States v. Huberty, 50 MJ 704 (AFCCA 1999).

(4) View not evidence. United States v. Ayala, 22 MJ 777 (ACMR 1986), *aff'd* 26 MJ 190 (CMA 1988).

(5) Unauthorized view. United States v. Wolfe, 24 CMR 57 (CMA 1955).

(6) Completeness of record of a view. United States v. Martin, 19 CMR 646 (AFBR 1955), *pet. denied*, 19 CMR 413 (CMA 1955).

2-7-23. ABSENT ACCUSED INSTRUCTION: PRELIMINARY FINDINGS

MJ: Under the law applicable to trials by court-martial, various circumstances may exist whereby a court-martial can proceed to findings and sentence, if appropriate, without the accused being present in the courtroom. I have determined that one or more of these circumstances exist in this case. You are not permitted to speculate as to why the accused is not present in court today and that you must not draw any inference adverse to the accused because (he) (she) is not appearing personally before you. You may neither impute to the accused any wrongdoing generally, nor impute to (him) (her) any inference of guilt as respects (his) (her) nonappearance here today. Further, should the accused be found guilty of any offense presently before this court, you must not consider the accused's nonappearance before this court in any manner when you close to deliberate upon the sentence to be adjudged.

Will each member follow this instruction?

REFERENCES: See [United States v. Minter](#), 8 MJ 867 (NMCMR 1980); see also [United States v. Denney](#), 28 MJ 521 (ACMR 1989) (indicating that accused's absence may be considered for rehabilitative potential); [United States v. Chapman](#), 20 MJ 717 (NMCMR 1985), *aff'd*, 23 MJ 226 (CMA 1986) (*summary affirmance*).

2-7-24. STIPULATIONS OF FACT AND EXPECTED TESTIMONY (NOT IAW A PRETRIAL AGREEMENT)

NOTE: Whenever the prosecution or defense offers a stipulation into evidence, the MJ should conduct an inquiry with the accused outside the presence of the court members along the following lines:

MJ: _____, before signing the stipulation, did you read it thoroughly?

ACC: (Responds.)

MJ: Do you understand the contents of the stipulation?

ACC: (Responds.)

MJ: Do you agree with the contents of the stipulation?

ACC: (Responds.)

MJ: Before signing the stipulation, did your defense counsel explain the stipulation to you?

ACC: (Responds.)

MJ: Do you understand that you have an absolute right to refuse to stipulate to the contents of this document?

ACC: (Responds.)

MJ: You should enter into this stipulation only if you believe it is in your best interest to do so. Do you understand that?

ACC: (Responds.)

MJ: _____, I want to ensure that you understand how this stipulation is to be used.

(IF STIPULATION OF FACT:) MJ: When counsel for both sides and you agree (to a fact) (the contents of a writing), the parties are bound by the stipulation and the stipulated matters are facts in evidence to be considered along with all the other evidence in the case. Do you understand that?

ACC: (Responds.)

(IF STIPULATION OF EXPECTED TESTIMONY:) MJ: When counsel for both sides and you agree to a stipulation of expected testimony, you are agreeing that if _____ were present in court and testifying under oath, (she) (he) would testify substantially as set forth in this stipulation. The stipulation does not admit the truth of the person's testimony. The stipulation can be contradicted, attacked, or explained in the same way as if the person was testifying in person. Do you understand that?

ACC: (Responds.)

MJ: _____, knowing now what I have told you and what your defense counsel earlier told you about this stipulation, do you still desire to enter into the stipulation?

ACC: (Responds.)

MJ: Do counsel concur in the contents of the stipulation?

TC/DC: (Respond.)

MJ: The stipulation is admitted into evidence as _____.

NOTE: Stipulations of expected testimony are admitted into evidence, but only read to the court members. They are not to be given to them for use in deliberations.

2-7-25. CONFSSIONAL STIPULATION OF FACT INQUIRY

NOTE: The following inquiry is required by United States v. Bertelson, 3 MJ 314 (CMA 1977), whenever a stipulation “practically amounts to a confession” as set forth in the discussion following RCM 811(c).

MJ: Please have the stipulation marked as a Prosecution Exhibit, present it to me, and make sure the accused has a copy.

TC: (Complies.)

MJ: _____, I have before me Prosecution Exhibit ____ for Identification, a stipulation of fact. Did you sign this stipulation?

ACC: (Responds.)

MJ: Did you read this document thoroughly before you signed it?

ACC: (Responds.)

MJ: Do both counsel agree to the stipulation and that your signatures appear on the document?

TC/DC: (Respond.)

MJ: _____, a stipulation of fact is an agreement among the trial counsel, the defense counsel, and you that the contents of the stipulation are true, and if entered into evidence are the uncontradicted facts in this case. No one can be forced to enter into a stipulation, and no stipulation can be accepted without your consent, so you should enter into it only if you truly want to do so. Do you understand this?

ACC: (Responds.)

MJ: Are you voluntarily entering into this stipulation because you believe it is in your own best interest to do so?

ACC: (Responds.)

MJ: _____, the government has the burden of proving beyond a reasonable doubt every element of the offense(s) with which you are charged. By stipulating to the material elements of the offense(s), as you are doing here, you alleviate that burden. That means that based upon the stipulation alone, and without receiving any other evidence, the court can find you guilty of the offense(s) to which the stipulation relates. Do you understand that?

ACC: (Responds.)

(IF JUDGE ALONE TRIAL:) MJ: If I admit this stipulation into evidence it will be used in two ways.

First, I will use it to determine if you are, in fact, guilty of the offense(s) to which the stipulation relates. And second, I will use it in determining an appropriate sentence for you.

(IF MEMBERS TRIAL:) MJ: If I admit this stipulation into evidence it will be used in two ways.

First, members will use it to determine if you are, in fact, guilty of the offense(s) to which the stipulation relates. And second, the trial counsel may read it to the court members and they will have it with them when they decide upon your sentence.

MJ: Do you understand and agree to these uses of the stipulation?

ACC: (Responds.)

MJ: Do both counsel also agree to these uses?

TC/DC: (Respond.)

MJ: _____, a stipulation of fact ordinarily cannot be contradicted. You should, therefore, let me know now if there is anything whatsoever in the stipulation that you disagree with or feel is untrue. Do you understand that?

ACC: (Responds.)

MJ: At this time, I want you to read your copy of the stipulation silently to yourself as I read it to myself.

NOTE: The MJ should read the stipulation and be alert to resolve inconsistencies between what is stated in the stipulation and what the accused will say during the inquiry establishing the factual basis for the stipulation.

MJ: Have you finished reading it?

ACC: (Responds.)

MJ: _____, is everything in the stipulation the truth?

ACC: (Responds.)

MJ: Is there anything in the stipulation that you do not wish to admit that is true?

ACC: (Responds.)

MJ: _____, have you consulted fully with your counsel about the stipulation?

ACC: (Responds.)

MJ: After having consulted with your counsel, do you consent to my accepting the stipulation?

ACC: (Responds.)

MJ: _____, at this time I want you to tell me what the factual basis is for this stipulation. Tell me what happened.

NOTE: At this point the military judge must personally question the accused to develop information showing what the accused did or did not do and what he/she intended, where intent is pertinent. The aim is to make clear the factual basis for the recitations in the stipulation. The military judge must be alert to the existence of any inconsistencies between the stipulation and the explanations of the accused. If any arise they must be discussed thoroughly with the accused, and the military judge must resolve them or reject the stipulation.

MJ: Does either counsel believe that any further inquiry is required into the factual basis for the stipulation?

TC/DC: (Respond.)

MJ: _____, has anybody made any promises or agreements with you in connection with this stipulation?

ACC: (Responds.)

MJ: Counsel, are there any written or unwritten agreements between the parties in connection with the stipulation?

NOTE: Should this inquiry reveal the existence of an agreement not to raise defenses or motions, the stipulation will be rejected as inconsistent with Article 45(a).

TC/DC: (Respond.)

MJ: Defense Counsel, do you have any objections to Prosecution Exhibit ____ for Identification?

DC: (Responds.)

MJ: Prosecution Exhibit ____ for Identification is admitted into evidence.

2-7-26. FLOW CHART FOR CHALLENGES AND BREAKING QUORUM

NOTE: If a challenge reduces the court below quorum, see Article 41 and chart below to determine the proper course of action. The proper COA depends on several factors: 1) what type of challenge brought the panel below quorum; 2) has either side exercised a peremptory challenge; 3) is the panel below Art 16 quorum (3/5/12) or below Art 25 quorum (1/3 enlisted); and, 4) if it's an Art 25 issue, could peremptory challenges potentially "fix" the problem. See also *United States v. Dobson*, 63 M.J. 1 (C.A.A.F. 2006).

(placeholder for chart)

2-7-27. ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE

NOTE 1: Argument or a request for a punitive discharge. It is improper for defense counsel to argue for a discharge or dismissal against the client's desires and if a dishonorable discharge is possible, the defense counsel may only argue for a bad-conduct discharge. *United States v. Dresen*, 40 MJ 462 (CMA 1994); *United States v. McMillan*, 42 CMR 601 (ACMR 1970). If the defense or the accused requests, argues for, or concedes the appropriateness of, a punitive discharge or dismissal, the military judge should conduct an inquiry with the accused outside of the presence of the court members. *United States v. McNally*, 16 MJ 32 (CMA 1983). But see *United States v. Lyons*, 36 MJ 425 (CMA 1993). The focus of the inquiry is to ensure that the accused consents to the argument and fully understands the ramifications of a punitive discharge or dismissal. Ordinarily, before argument or the accused's making a request for a discharge or dismissal, the defense counsel should inform the military judge outside the presence of the court members of the planned argument or request. This procedure will ensure that the inquiry is done before the members hear the argument or request. If the argument is made before the inquiry below is conducted, the inquiry should be made before the court closes to deliberate on the sentence. If the accused did not wish the argument to be made, the military judge should instruct the members to disregard that portion of the defense's argument. The following inquiry may be appropriate:

MJ: (Accused), do you understand that the only discharge(s) this court can adjudge (is) (are) a bad-conduct discharge (and a dishonorable discharge) (is a dismissal)?

ACC: (Responds.)

MJ: Do you understand that a (bad-conduct discharge) (dismissal) will forever adversely stigmatize the character of your military service and it will limit your future employment and schooling opportunities?

ACC: (Responds.)

MJ: Do you understand that a (bad-conduct discharge) (dismissal) may adversely affect your future with regard to legal rights, economic opportunities, and social acceptability?

ACC: (Responds.)

MJ: Do you understand that by (receiving a bad-conduct discharge) (being dismissed), you will lose substantially all benefits from the Department of Veterans Affairs and the Army establishment, as well as other benefits normally given by other governmental agencies?

ACC: (Responds.)

(IF RETIREMENT ELIGIBLE: MJ: Do you understand that a (bad-conduct discharge) (dismissal) terminates your military status and will deprive you of any retirement benefits, to include retired pay?

ACC: (Responds.)

MJ: Have you thoroughly discussed your desires with your defense counsel?

ACC: (Responds.)

MJ: Do you believe you fully understand the ramifications of a (bad-conduct discharge) (dismissal)?

ACC: (Responds.)

MJ: Are you aware that if you do not receive a punitive discharge from this court-martial, then your chain of command may very well try to administratively separate you from the service?

ACC: (Responds.)

MJ: Are you also aware that an administrative separation is considered much less severe than a discharge from a court-martial and will not stigmatize you with the devastating and long term effects of a discharge from a court-martial?

ACC: (Responds.)

MJ: (Accused), knowing all that I and your defense counsel have explained to you, is it your express desire to be (discharged from the service with a bad-conduct discharge) (dismissed from the service) (if, as you indicate, it will preclude (your going to confinement) (an extended period of confinement) (_____))?

ACC: (Responds.)

MJ: Do you consent to your defense counsel stating an argument that you desire to be (discharged with a bad-conduct discharge) (dismissed from the service) (if it will preclude (your going to confinement) (an extended period of confinement) (_____))?

ACC: (Responds.)

NOTE 2: Sentence Appropriateness. The sentencing authority should not adjudge a bad-conduct discharge or a dismissal merely based upon a request for one. The discharge or dismissal must be an appropriate punishment for the accused and the offenses of which the accused stands convicted before it can be adjudged. United States v. Strauss, 47 MJ 739 (NMCCA 1997).

NOTE 3: Requesting a Dismissal. Although no case specifically holds that counsel may argue for a dismissal, appellate courts have implicitly recognized such arguments as proper. See United States v. Worrell, 3 MJ 817 (AFCMR 1977) (arguing for a dismissal is not ineffective assistance of counsel); United States v. Nunes, 39 MJ 889 (AFCCA 1994) (argument held not to be a request for dismissal); United States v. Perry, 48 MJ 197 (CAAF 1998) (argument for dismissal implicitly approved; alleged error was failure to instruct on the impact of a dismissal).

NOTE 4: Title 10, United States Code, Section 1161(b) (2) authorizes the President to “drop from the rolls of any armed force any commissioned officer...who may be separated under section 1167 of this title by reason of a sentence to confinement adjudged by a court-martial.” Section 1167 provides that “a member sentenced by a court-martial to a period of confinement for more than six months may be separated from the member’s armed force at any time after the sentence to confinement has become final...and the member has served in confinement for a period of six months.”

**2-7-28. GUILTY PLEA - ADVICE TO ACCUSED WHEN FOLLOWING RAISED:
MENTAL RESPONSIBILITY, EVIDENCE NEGATING MENS REA, COMPETENCE,
OR FAILURE TO REMEMBER**

NOTE 1: If the accused has pled guilty and the issue of the accused's mental responsibility, lack of mens rea, or competence to stand trial is raised during trial, the military judge should conduct one or more of the following inquiries, as appropriate. See Article 50a, UCMJ; Ellis v. Jacob, 26 MJ 90 (CMA 1988); United States v. Berri, 33 MJ 337 (CMA 1991); Benchbook Instructions 6-1 through 6-5 (Sanity and Partial Mental Responsibility) and 5-17 (Evidence Negating Mens Rea). During a Care inquiry, to distinguish between the "mere possibility of a defense" (which does not require further inquiry by the military judge) and a "possible defense" (which does), see United States v. Hayes, 70 MJ 454 (CAAF 2012).

NOTE 2: Lack of mental responsibility or lack of mens rea due to partial mental responsibility raised. If the issue of the accused's lack of mental responsibility or lack of mens rea due to partial mental responsibility at the time of the offenses charged has been raised during the providence inquiry, conduct the following inquiry. If necessary, the military judge may sua sponte order an inquiry under RCM 706 to occur during or after the trial.

MJ: Defense counsel, (during my inquiry into the providence of the accused's guilty plea) (during your sentencing case) (____), the issue of the accused's (lack of mental responsibility) (partial mental responsibility) at the time of the offense(s) charged (in (the) specification(s) (____) of (the) (Additional) Charge (____)) was raised. Specifically, (the accused stated (____)) ((Doctor)(____) testified that (____)) (____). (Do you believe the accused has a defense based upon lack of mental responsibility) (Do you believe the accused, because of partial lack of mental responsibility, was unable to (entertain the premeditated design to kill) (form the specific intent to (____)) (know that (____)) (act willfully) (____)) with respect to (the) (those) charged offense(s)?

DC: (Responds.)

MJ: Have you fully investigated potential mental responsibility defenses by reviewing the facts in this case and speaking with the accused? (Have you spoken with the accused's doctor(s)?) (Have you obtained assistance from mental health professionals in evaluating this issue?)

DC: (Responds.)

MJ: Has a mental responsibility inquiry been conducted under RCM 706? (If not, do you believe there is reason to believe the accused lacked mental responsibility for any offense charged?)

DC: (Responds.)

(MJ: Do you desire a continuance in order to further investigate this issue?)

DC: (Responds.)

NOTE 3: Defense states no lack of mental responsibility defense. If defense counsel states that no mental responsibility defenses exist, the MJ should conduct the following inquiry of the accused.

MJ: _____, military law recognizes a defense of lack of mental responsibility. This lack of mental responsibility defense would be a complete defense to the offense(s) charged (in (the) specification(s) (___) of (the) (Additional) Charge (___)). The defense of lack of mental responsibility has two parts. First, at the time of (the) (those) charged offense(s), you must have been suffering from a severe mental disease or defect. Second, as a result of that severe mental disease or defect, you must have been unable to appreciate the nature and quality or wrongfulness of your conduct. Do you understand this?

ACC: (Responds.)

MJ: _____, has your defense counsel explained to you the defense of lack of mental responsibility?

ACC: (Responds.)

MJ: Do you believe that, at the time of (the) (those) charged offense(s), you were suffering from a severe mental disease or defect?

ACC: (Responds.)

MJ: Do you believe that, at the time of (the) (those) charged offense(s), you were unable to appreciate the nature and quality or wrongfulness of your actions?

ACC: (Responds.)

MJ: Did you understand what you were doing at the time of (the) (those) charged offense(s)? Why?

ACC: (Responds.)

MJ: Did you understand what you were doing at the time of (the) (those) charged offense(s) was wrong? Why?

ACC: (Responds.)

MJ: (Accused), based on what I have told you and what your defense counsel told you, do you believe the defense of lack of mental responsibility applies in your case?

ACC: (Responds.)

MJ: Defense counsel, are you affirmatively disclaiming the defense of lack of mental responsibility?

DC: (Responds.)

MJ: (Accused), do you agree?

ACC: (Responds.)

NOTE 4: Defense states no partial lack of mental responsibility for specific mens rea offense. If any offense includes a specific mens rea element, ask the following additional questions.

MJ: Defense counsel, based on your investigation, do you believe the accused suffered from a mental (disease) (defect) (impairment) (condition) (deficiency) (character or behavior disorder) (_____) that prevented him/her from (entertaining the premeditated design to kill) (forming the specific intent to _____) (knowing that _____) (acting willfully) (_____) at the time he/she committed (the) (those) charged offense(s)?

DC: (Responds.)

MJ: (Accused), has your defense counsel explained to you that partial lack of mental responsibility can negate certain mental states required for (the) (those) charged offense(s)?

ACC: (Responds.)

MJ: (The military judge should describe the offense(s) to which partial lack of mental responsibility might apply, and the affected elements, as follows:) I advised you earlier that one of the elements of the offense(s) charged (in (the) specification(s) (____) of (the) (Additional) Charge (____)) is that you (had a premeditated design to kill) (had the specific intent to _____) (knew that _____) (acted willful) (_____). You may have been sane at the time of the charged offense(s), yet, because of some underlying mental disease, defect, impairment, condition, deficiency, or character or behavior disorder, you may have been incapable of (entertaining the premeditated design to kill) (forming the specific intent to _____) (having knowledge that _____) (acting willfully) (_____). Do you understand this?

ACC: (Responds.)

MJ: What, if any, mental disease, defect, impairment, condition, deficiency, or character or behavior disorder, were you suffering from at the time you committed (the) (those) charged offense(s)? Were you seeing a doctor? What medications were you taking at that time? What effects, if any, did the mental disease, defect, impairment, condition, deficiency, or character or behavior disorder and these medications have on you? At the time you committed (the) (those) charged offense(s), did you continue to perform military duties?

ACC: (Responds.)

MJ: Do you believe that, at the time of (the) (those) charged offense(s), you were suffering from a mental disease, defect, impairment, condition, deficiency, or character or behavior disorder that would have prevented you from (entertaining the premeditated design to kill) (forming the specific intent to _____) (having knowledge that _____) (acting willfully) (_____)? Why?

ACC: (Responds.)

MJ: Defense counsel, are you affirmatively disclaiming the defense of partial mental responsibility with respect to (the) (those) charged offense(s)?

DC: (Responds.)

MJ: (Accused), do you agree?

ACC: (Responds.)

NOTE 5: Lack of competence to stand trial raised. To the extent that the accused's competence to stand trial is raised, the military judge should conduct the following inquiry.

MJ: Defense counsel, have you fully investigated the issue of whether the accused suffers from a mental disease or defect that prevents him/her from understanding the nature of these proceedings or from cooperating intelligently with you in the preparation of the defense?

DC: (Responds.)

MJ: Based on your investigation, do you believe the accused suffers from a mental disease or defect that prevents him/her from understanding the nature of these proceedings or prevented him/her from cooperating intelligently with you in the preparation of the defense?

DC: (Responds.)

MJ: Has a mental responsibility inquiry been conducted under RCM 706? (If not, does defense counsel believe there is reason to believe the accused lacks competence to stand trial?)

DC: (Responds.)

MJ: Do you desire a continuance in order to further investigate this issue?

DC: (Responds.)

MJ: (Accused), are you currently suffering from any mental disease or defect such that you cannot understand these proceedings?

ACC: (Responds.)

MJ: Have you been diagnosed with any condition that would affect your ability to understand these proceedings or cooperate with your defense counsel?

ACC: (Responds.)

MJ: Have you understood everything we've talked about today?

ACC: (Responds.)

MJ: Do you understand the roles of all the participants? Do you understand the trial counsel represents the government and has the responsibility to present evidence tending to establish your guilt of these offenses?

ACC: (Responds.)

MJ: Do you understand the defense counsel represents you and has the responsibility to challenge the evidence presented against you, cross-examine witnesses, and make legal arguments on your behalf?

ACC: (Responds.)

MJ: Do you understand I am the military judge in your case and I rule on all objections, preside over all open sessions of court, and, if you select trial by judge alone, determine your guilt or innocence and, if found guilty, will impose sentence upon you?

ACC: (Responds.)

MJ: Are you taking any medication? What medication are you taking? Are you feeling the effects of any medication? Within the last 24 hours have you taken the medication in the prescribed dosage and at the times ordered by the doctor? Does taking this medication in the prescribed manner make it difficult for you to understand these proceedings or have you understood everything we've talked about today?

ACC: (Responds.)

MJ: How long have you been taking (this) (these) medication(s)? Have you continued to perform military duties while you are taking your medication(s)? Do you have a profile limiting your military duties? Have you been assigned to quarters?

ACC: (Responds.)

MJ: I note that during my discussion with the accused today for the past _____ hours, the accused (has been engaged and attentive) (has responded appropriately to my questions) (has maintained eye contact with me) (has not slurred his word nor stuttered, stumbled, or otherwise given me any indication that he is anything but fully coherent) and (has demonstrated appropriate affect for these proceedings) (_____). It appears to me that from his participation and demeanor throughout the proceedings, the accused is not impaired and that he understands the proceedings that have taken place today and is able to participate in his defense. Have you understood the proceedings that have taken place today?

ACC: (Responds.)

MJ: Are you able to assist your defense counsel in preparing your defense?

ACC: (Responds.)

MJ: I find that the accused is not presently suffering from a mental disease or defect rendering him/her mentally incompetent to stand trial under RCM 909. The accused is able to understand the nature of these proceedings and able to (conduct) (cooperate intelligently in) the defense of this case.

NOTE 6: Failure to remember raised: MJ may use the following questions during a providence inquiry where the accused wishes to plead guilty to an offense but cannot recall the facts or circumstances due to Intoxication or amnesia.]

MJ: (Accused), in a pretrial conference, your counsel informed me that you could not remember what you had done/what your actions were on _____

- What is it you cannot remember?
- Why is it that you cannot recall what happened?
- How much (alcohol) did you consume?

MJ: (Accused), now you have pleaded guilty to _____. I need to know what makes you think you are guilty.

- Have you read any reports or statements concerning this incident? What specifically have you read?
- Are you satisfied that the reports and statements are true and correct? Have you talked with the victim(s) or any of the witnesses?
- Do you know the victim(s) or any of the witnesses, and if so, how well? Did your counsel talk with the victim(s) or any of the witnesses?
- Do you have any reason to believe that any of the victim(s) or witnesses would lie about what you did on _____

MJ: (Trial counsel), have you provided to the defense all information in the hands of the prosecution pertaining to the offense(s)? Does that include all incriminating evidence and all evidence that might be favorable to the accused?

MJ: (Defense counsel), are you satisfied that you have received all the evidence in the possession of the prosecution pertaining to the offense(s), both favorable and unfavorable to the accused?

MJ: (Accused), are you satisfied that you have received all the evidence in the possession of the prosecution pertaining to the offense(s), both favorable and unfavorable to you?

MJ: (Defense counsel), was there an Article 32 investigation conducted in this case?

MJ: [If yes] (Accused), at the Article 32 investigation, did you hear the prosecution witnesses testify?

MJ: Did you have an opportunity to review documentary evidence utilized by the prosecution at that hearing, including statements of witnesses?

MJ: (Accused), have you personally reviewed the evidence available concerning the offense(s) alleged against you?

MJ: Before deciding to plead guilty, did you consider all of the evidence?

MJ: After considering all the evidence and discussing the case with your defense counsel, do you believe that you committed the offense(s) charged?

MJ: Do you have any doubt whether or not you committed the offense(s)?

MJ: (Accused), what do you personally believe occurred with regard to the offense(s)?

MJ: (Accused), I have previously described to you the elements that the government must prove beyond a reasonable doubt before you can be found guilty. Do you remember those elements? Do you believe that the prosecution could prove each element of the offense(s) beyond a reasonable doubt?

MJ: [If specific intent/ actual knowledge an element] Do you understand that in order for the prosecution to prove your guilt to the offense(s) of (), it must prove beyond a reasonable doubt that you had (actual knowledge of _____ (the specific intent to _____)?

MJ: [If specific intent/ actual knowledge an element] Do you understand that in considering your ability to have (actual knowledge of _____)(the specific intent to _____), (I) (the court members) would consider the evidence presented on your state of (intoxication) (amnesia) (_____)?

MJ: [If specific intent/ actual knowledge an element] And do you understand that if you entered a plea of not guilty to the offense(s) of (_____) and proceeded to trial on the facts, if the trier of the facts were not convinced beyond a reasonable doubt that you had (actual knowledge of _____) (the specific intent to (_____) you would be acquitted of the offense(s)?

MJ: [If specific intent/ actual knowledge an element] Although you cannot remember because of (intoxication) (amnesia) () what occurred with regard to the offense(s) of (_____), are you convinced that at the time of the offense(s), you had (actual knowledge of (_____) (the specific intent to _____)?

MJ: (Defense counsel), what, if any, defenses do you perceive in this case?

MJ: Have you discussed these matters with the accused?

MJ: (Accused), are you convinced of your own guilt even though you cannot remember the facts and circumstances surrounding the alleged offense(s)?

MJ: Despite not remembering exactly what happened, do you still want to plead guilty?

2-7-29. SPECIAL VICTIM ADVOCATE

MJ: (_____), you have indicated you are appearing as the Victim Legal Counsel for (state the alleged victim's name). Please state your qualifications for the record.

VLC/Civilian Counsel: I am qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. I have not acted in any manner that might tend to disqualify me in this court-martial.

(Civilian): I am an attorney and licensed to practice law in the state(s) of _____. I am a member in good standing of the (_____) bar(s). I have not acted in any manner which might tend to disqualify me in this court-martial.

(OATH FOR COUNSEL:) MJ: Do you, _____, (swear) (affirm) that you will faithfully perform the duties of (Special Victim Counsel)(civilian counsel) for (name of alleged victim) in the case now in hearing (so help you God)?